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February 13, 2004

VIA FACSIMILE AND OVERNIGHT COURIER

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Re: FRAP Amendment to Permit Citation of Unpublished Decisions

Dear Mr. McCabe:

The Northern District of California Chapter of the Federal Bar Association (the "Chapter") submits this letter in opposition to the proposed amendment to the Federal Rule of Civil Procedure 32.1, "Citation of Judicial Dispositions." The proposed amendment would eliminate all restrictions "upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like." This letter expresses the position only of the Chapter, and not that of the Federal Bar Association itself.

The Chapter has 168 members. We represent practitioners who specialize in federal practice and come from every aspect of that practice. We overwhelmingly oppose the proposed rule change.

We believe that the issue should be left to the discretion of the individual circuit courts, as is now the case. In those circuits which restrict citation of "not for publication" dispositions, like the Ninth Circuit, parties may always adopt the reasoning in an unpublished disposition. Citation to the case itself, however, lends to it an aura of importance that is unwarranted.

It is no secret that the language in unpublished dispositions is not given the careful attention by the judges that the wording of published opinions receive, particularly with respect to possible use or misuse in future litigation. Yet permitting its citation suggests that all of the judges joining in the decision agree, not just on the result, but on the language. Given the large volume of cases which federal appellate judges must decide every year, it is simply not possible for them to closely scrutinize the language of each decision in which they join.

Moreover, a change in the rules to allow free citation of unpublished dispositions will increase the workload for lawyers and for judges – and not just the judges of the affected appellate courts – who will as a practical matter have to sift through and analyze large amounts of

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additional materials, most of which will be useless (which is why they were designated not for publication). The result will be increased court backlog and increased litigation costs.

Further, we are concerned that the proposed rule change will force the Ninth Circuit to move to single word dispositions – “Affirmed” or “Reversed” – as some circuits have done. An unexplained disposition does not give the losing party the feeling that the court has heard and considered his or her position. We think it is important that the appellate courts explain to the parties the basis for their decisions, and are concerned that the proposed rule change will inhibit the courts’ ability to do that.

Finally, to the extent there is any value to be gleaned from unpublished dispositions, permitting the citation of unpublished dispositions creates an unlevel playing field. Poor litigants do not necessarily have equal access to those materials, and may be disadvantaged relative to litigants who have ready access.

We thank you for the opportunity to comment.



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cc: United States Court of Appeals for the Ninth Circuit
Jack D. Lockridge, Executive Director, Federal Bar Association