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Honorable Howard Coble
Chairman, Subcommittee on Courts, the Internet and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dr. Mr. Chairman:

On June 28, 2002, your subcommittee held an oversight hearing on the issue of unpublished federal appellate court decisions. This topic has aroused controversy since 1973, when the Judicial Conference adopted a model rule discouraging the publication of all "non-precedential" opinions. Attention was re-focused on the issue a few years ago because of the Eighth Circuit Court of Appeals' decision in Anastastoff v. United States, which held that the circuit rule denying precedential status to unpublished opinions is unconstitutional under Article III of the U.S. Constitution. Although the decision was subsequently vacated as moot by the en banc court, it re-ignited debate within the American Bar Association over the wisdom of non-publication and non-citation rules, which led to the adoption of policy last August. We are writing to convey our position on the subject and request that this letter and attachment be included in the hearing record.

Although all federal courts of appeals have adopted similar rules regarding standards for publication of opinions, which generally restrict publication to those deemed to have precedential value, rules governing the ability of a litigant to cite unpublished opinions and the effect, if any, that a court gives to such unpublished opinions vary considerably from circuit to circuit. Some federal courts generally forbid citation except for very limited purposes, such as to establish res judicata or collateral estoppel; some permit citation but explicitly state that opinions lack precedential value; others permit citation but recognize that unpublished opinions may have persuasive value; and, finally, one circuit – the District of Columbia Circuit –recently amended its rules and now allows unpublished orders and explanatory memoranda to be cited as precedent.

After careful study, the American Bar Association concluded that the lack of uniformity is problematic and that there is no longer any justification for it. The following policy was adopted last August:

RESOLVED, that the American Bar Association opposes the practice of various federal courts of appeal in prohibiting citation to or reliance upon their unpublished opinions as contrary to the best interests of the public and the legal profession.

FURTHER RESOLVED, that the American Bar Association urges the federal courts of appeals uniformly to:

1. Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and
2. Permit citation to relevant opinions.

Both the resolution and its accompanying background report are attached to this letter. Please note, however, that only the resolution itself constitutes official ABA policy; the background report is included only for explanatory purposes.

The traditional justifications for current rules prohibiting citation to unpublished federal appellate court opinions -- the increased cost and time to obtain, store and research a growing body of case law; the need for judicial efficiency; and the perceived unfairness to some litigants who may have difficulty getting access to unpublished opinions -- no longer carry substantial weight. On the other hand, several practical litigation considerations exist to support adoption by the federal courts of appeals of a uniform rule permitting citation to relevant unpublished opinions.

First, and perhaps foremost, is the issue of the quality and extent of the record upon which to base a further appeal. Rules barring citation to unpublished decisions prevent a party from creating a complete record of the authorities and prior appellate rulings bearing on a matter.

Second, by restricting the effect and use of such decisions, rules against citation of unpublished decisions also have an adverse impact on the appellate court's ability to provide a complete and instructive record of the court's analysis and rationale for its decision. This impact can be felt both in terms of a court's inability to support its decision by reference to prior (but unpublished) decisions and in its inability to cite or rely upon such decisions in distinguishing the outcome of other cases.

Third, rules against citing unpublished decisions may create anomalous situations in which the prior unpublished decisions of the particular court of appeals in the circuit in which the case has been brought are given less weight than published decisions of other appellate courts. We believe that the expectations of the parties and the federal appellate system would be better served where a court's own body of prior decision-making is given proper credence and effect vis-à-vis the decisions of a sister court.

Fourth, the lack of uniformity among the rules and approaches of the various federal appeals courts also is problematic. The same unpublished opinion may be citable for its persuasive value in one circuit court but not be citable in another. This difference in approach is particularly vexing because it could result in situations where an unpublished opinion could be cited to sister courts but not to the court authoring the opinion.

The fairness and access concerns that historically have been raised to justify rules against citation to unpublished decisions have been diminished by the advances and expansions in electronic publication and other mass dissemination of unpublished decisions. Overall, access to unofficial reporting media has increased, while the cost of collecting, storing and researching has decreased. The unpublished opinions of most of the federal circuits are effectively "published" and accessible either via electronic legal research services, Internet websites operated by the courts themselves, or in specialized reporters. Only the Third, Fifth and Eleventh Circuits do not make their unpublished opinions available in electronic form. To eliminate any gap this might create in the ability to conduct legal research readily, the Association's policy also recommends that federal circuits take all necessary steps to make their unpublished decisions accessible to the public through a variety of mediums.

Allowing citation to unpublished opinions will help to ensure that judges give full consideration to their decisions in all cases by allowing parties to make the courts aware of the complete body of case law that may affect their particular case. In contrast, depriving litigants and courts of the use of such decisions as precedent or for persuasion may leave issues unresolved that could have been settled by reference to such decisions. In addition, the potential deterrent value of a prior adverse appellate decision is, for practical purposes, eliminated when the decision cannot be cited because it was not published. Finally, citation to unpublished opinions will deter institutional litigants from attempting to influence the publication decision to eliminate the effect of unfavorable opinions against them.

In light of these compelling arguments, the ABA has urged adoption by the federal courts of uniform procedures permitting citation to relevant unpublished opinions. While there has been no statement of intent to consider a legislative fix by your Subcommittee, we wish to emphasize our adherence to the position that the federal courts – not Congress – should initiate rules changes for the courts. The Association has long supported Congress' authorization for the federal judiciary to prescribe rules of practice and procedure for the federal courts, subject to Congress' right to reject, modify or defer any of the proposed rules, as set forth in the Rules Enabling Act, 28 U.S.C. §§ 2071-2077.

The use of unpublished opinions in the federal courts deserves our careful attention since unpublished opinions, today, account for approximately 80 per cent of all federal appellate court decisions. We thank you for holding hearings and focusing attention on this important issue.

Sincerely,

Robert D. Evans

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cc: Honorable John Conyers, Jr.