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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 Change to Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I write to express my opposition to amending FRAP 32.1(a) to permit litigants to cite unpublished or non-precedential memorandum dispositions as if they were any other decision, even though they are non-binding on the court and outside of *stare decisis*.

I am a lawyer in private practice, and my focus is litigation at both the trial and appellate levels. Before entering private practice, I had the privilege of serving as a law clerk to a federal appeals court judge. In addition to litigating on behalf of my clients, I submit briefs not infrequently to appellate courts on behalf of private parties and trade associations appearing as *amicus curiae*. I have nearly 18 years of private-practice experience in working with decisions of the appellate courts, including "unpublished" dispositions.

I am opposed to the rule change principally because it will inevitably lead to a slower throughput of cases in the court system and increase costs. The appellate courts' job is to decide cases and pronounce the law, and the appellate courts should be permitted discretion to balance those objectives, of which their various no-citation rules are an example. Compared with memorandum dispositions, published decisions naturally require a higher degree of polish and review of prior authority by the court, as the Committee Note recognizes. This follows from the law-articulation function of the appellate courts; (unpublished) memorandum dispositions assure that cases are decided promptly yet still provide the parties with the confidence that their arguments were considered. Because these "unpublished" decisions are still public, the citizenry is able to scrutinize what the courts are doing, and the parties are always free to petition to the court to publish a memorandum decision if the case or reasoning in fact is of general import.

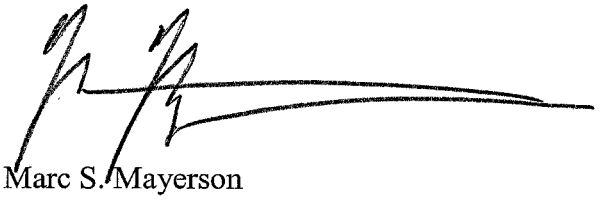
As a litigator and brief writer, I find that the issues I confront turn less on finding some case on point than it is to think clearly, applying principles to the particular facts and equities. Having more decisions available for me to cite (especially ones that are not binding) is not likely to improve my ability to provide advice to my clients or to advise the particular court before which I am appearing; instead, more decisions that are citable will yield more decisions that I need to review and more cases that get cited in my briefs (in text and in footnotes), even if they do not qualitatively improve the legal framework for analysis. Further encouraging or at least permitting the cluttering of briefs with this material is unlikely to improve the quality of judicial decisionmaking or the advocacy of lawyers. The more likely result is more work for all concerned in wading through "unpublished" but still citable material and more work for appeals-court judges who no doubt will feel a hydraulic pressure to devote more time to their unpublished and unprecedential decisions (including providing more detailed exposition of the facts) that may be used by lawyers and their fellow judges as precedent (if only for its reasoning, application of law to fact, and the like, rather than per the command of *stare decisis*).

Finally, as a lawyer who does have the good fortune to appear in jurisdictions all over the country, I can confirm from personal experience that the differences in citations rules – like the differences in other court rules, forms, and processes that vary among the circuits – pose no undue burden or hardship: lawyers should read the applicable rules and conform to them, which FRAP 32.1 will not alter. The argument about cross-jurisdictional differences leading to hardship is an argument against all local rules and is a makeweight when trotted out for one rule in particular. With due respect, it is hardly a sufficient ground for justifying this rule change versus any other where there is some circuit-by-circuit variation.

In short, the current system – which has worked well for a number of years – is more likely to continue to facilitate the high quality of justice of which our country is rightly so proud. Accordingly, I would urge the Committee on Rules of Practice and Procedure to refrain from implementing FRAP 32.1(a).

Thank you for your consideration of my views.

Yours truly,



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