MYRON H. BRIGHT
UNITED STATES CIRCUIT JUDGE

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03-AP-047

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: Comments on proposed FRAP 32.1

Dear Mr. McCabe:

As an appellate judge for over thirty-five years, I oppose the proposed FRAP Rule 32.1[1] which would allow parties to cite written dispositions in other cases that are designated as "unpublished" or "not precedential." The rule takes away the federal appellate courts' control over briefs presented in their courts. The adoption of such a rule would be a big mistake for the following reasons:

1. Since each circuit has different procedures for deciding and writing non-precedential and/or unpublished decisions, each circuit should have the authority to use those decisions as it sees fit. Individual circuits are in the best position to decide whether their non-precedential opinions are drawn with sufficient care and with ample judicial input to justify reliance on such decisions as precedent.

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[1]The proposed rule reads:

> Rule 32.1. Citation of Judicial Dispositions
> (a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

2. Implementation of the proposed rule will increase the already-overextended judge's workload. If parties are allowed to cite unpublished decisions, judges have the obligation to spend time and energy to determine whether the unpublished decision should have precedential authority and whether the court should consider the underlying reasoning of the decision.

3. The proposed rule will unnecessarily increase the research time and expense in preparing an appellate case. This results in more work, mostly unnecessary, for lawyers. Thus, the rule would have the unwanted effect of increasing the cost of appellate litigation. This increased cost would fall disproportionately on lawyers (and their clients) working in substantive areas of law that comprise a large percentage of unpublished cases: habeas corpus, immigration, and social security. These lawyers and clients cannot bear such an increased cost of appellate litigation.

4. The proposed rule and the consideration of unpublished opinions will not benefit the opinion writing process. Most unpublished opinions are not helpful to the decision makers. Instead, the use of unpublished opinions may lengthen the decision writing process to demonstrate why the unpublished opinion cannot be and should not be persuasive.

5. The proposed rule would needlessly increase the size and volume of the federal reporters. This results in more expense for law libraries, lawyers who subscribe to the reporters, and researchers. The rule may also result in greater profits for the companies responsible for printing the opinions or putting them on-line.

6. No need exists for the proposed rule. Most appellate courts have two forms of non-precedential opinions. First, one form of unpublished decisions are those that give reasons to the parties for the ruling. However, this form of decision restricts the precedential value of the decision to very specific and narrow exceptions, i.e., the parties' further litigation, considerations of res judicata, or

collateral estoppel. The other form of non-precedential opinions gives no reasons for the disposition, i.e., affirmed or enforced without opinion.

I believe if the proposed rule prevails, appellate courts will respond by increasing the number of opinions that do not provide reasons or explanations of the disposition. Increasing the number of opinions without reasons or explanations does not provide the parties to the case a sense of understanding of the court's reasoning. For myself, I always try to briefly inform the parties of my reasoning in non-opinion, not precedential decisions (8th Cir. Rule 47B). If other parties are allowed to cite these decisions in their briefs, I probably will stop providing reasons for the disposition of the case.

7. I rely on a well-known cliche, "If it ain't broke, don't fix it." The various non-publication rules in the circuits have operated quite well. I have heard very few complaints. The idea behind the proposed rule seems to exalt theory over practicality.

Finally, I foresee that the imprecise language of the proposed rule will create a practice of parties seeking to strike portions of opposing briefs, claiming that the opponent has violated the rule by including extraneous or improper materials in the briefs or records. This too will needlessly interfere with the appellate court's prompt disposition of cases based on their merit and add to the judge's workload.

Thank you for your consideration.

Sincerely,

Myron H. Bright

Myron H. Bright
CC: Judges, U.S. Court of Appeals for the Eighth Circuit