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December 18, 2003

03-AP-078

THE LAW SCHOOL

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

VIA FACSIMILE (202) 502-1755

Re: Proposed FRAP Rule 32.1

Dear Secretary McCabe:

I am writing to express my opposition to Proposed Rule 32.1, FRAP, dealing with the citation of unpublished opinions. I write as a law professor who teaches a course involving federal litigation, as a former law clerk who has observed how judicial chambers operate, and as an attorney who has handled appellate matters.

In my view, the rule makes little sense and would diminish the quality of justice in the circuit courts. First, allowing parties to cite unpublished opinions will give certain parties an unfair advantage – those who have the resources to have access to computer databases or those who have frequently litigated in a particular area and therefore have their own private library of these opinions. I have confronted parties, usually a big corporation that has litigated a certain issue many times before, who can pull out dozens of unpublished opinions supporting their side; there may be dozens of opinions holding the opposite as well, but I have no way of ferreting them out without a lot of expense. Certainly, requiring the courts to post their opinions on the internet will alleviate some of this inequity, but older opinions will still not be available this way and the web sites may not be indexed in a way that makes them easy to search. The bottom line is that this will give well-financed or large institutional parties an unfair advantage.

Moreover, increased reliance on unpublished opinions will force courts to take one of two approaches: either they will spend more time crafting the unpublished opinions, or (and this is more probable) they will simply shorten many dispositions to "Affirmed" or "Denied." The former course will probably mean huge backlogs in decisions or in the alternative, insufficient time devoted to important cases. The latter course would be unfortunate, because it would deprive the parties of the court's reasoning, and perhaps more importantly, the knowledge that their claims have been carefully considered.

The proposed rule is limited in effect, according to the committee, because these opinions are only allowed to be cited; there is no mandate that courts actually treat them as binding precedent. This simply serves to muddy the waters – how will we know exactly what value a court will give these opinions? If they are to be accorded no weight,

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then why are they cited at all? Judges and litigants will have to assume that these opinions may have impact at least as persuasive precedent and will be forced to treat them accordingly. The limitation doesn't eliminate the negative impact of the rule.

Citing this type of case will be extremely misleading. Typically the court does not recite the facts carefully and completely, which makes it impossible to determine whether a future case is comparable. Moreover, the court may not have completely spelled out caveats and exceptions, knowing that they are irrelevant to the case at hand, but which might be very important if the case becomes precedent.

Finally, the question I have is "what's the problem?" The courts have developed a system that works – it separates the wheat from the chaff and concentrates our judicial resources where they should be concentrated. The parties in the case at hand get more information about how the court decided their case and justice is efficiently administered. Why is it necessary to now up the ante? And philosophically, why shouldn't this be a matter for each circuit to decide internally? Where is the need for national uniformity on this issue?

Please add my voice to those who consider this to be an unwise step. I hope the committee will reconsider and leave well enough alone. Thank you for considering these thoughts.

Sincerely,

Jerry L. Anderson
Richard M. and Anita Calkins
Distinguished Professor of Law