UNIVERSITY OF ILLINOIS
AT URBANA-CHAMPAIGN

College of Law
504 East Pennsylvania Avenue
Champaign, IL 61820

03-AP-091

January 6, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed FRAP 32.1

Dear Mr. McCabe:

I understand that the Committee on Rules of Practice and Procedure has proposed a new rule on the citation of judicial dispositions. Although I understand the rationale behind the proposed rule, I believe that on balance it would impede efficient resolution of cases in federal court and also give better financed litigants a perceived, if not a real, strategic edge. I strongly urge your committee to reconsider.

More specifically,

1. The rule would increase the number of citable dispositions by three or four times what it is today. Very few, if any, of these additional citable dispositions are likely, however, to make a real difference in that they would persuade a court to take a position on a legal issue that the court would not otherwise take. The benefit from introducing this new "case law" into the already substantial body of authoritative cases is thus extremely low.

2. The cost, on the other hand, is substantial. This includes time spent by counsel finding and interpreting these dispositions and then working them into oral arguments and written memoranda. There is also the time spent by judges and law clerks listening to and reading these citations and then, for the many judges who consider these dispositions to be of little value, distinguishing them from genuinely authoritative sources that have also been cited by counsel.

3. These costs would not burden all litigants and lawyers equally. Those without access to Lexis or Westlaw, or who are unable to pay for extensive use of these on-line services, would be at a disadvantage even though some, but not all, of these dispositions can also be found at lower cost on the Web (Web searches also can be more time consuming and less accurate than on-line services).

Litigants who cannot afford to pay lawyers to wade through dispositions of little persuasive value will believe themselves to be at a disadvantage vis a vis those with more resources. Lawyers, afraid of being outdone by opposing counsel in finding and citing marginally relevant authority, may pressure clients to pay for time spent on such endeavors, whether or not the clients can afford it. In short, by adopting this rule, the federal courts would add to the already deeply troubling problem that litigants who can afford to spend enormous amounts of money on lawyer time and litigation costs are perceived to have an advantage over those who cannot.

In sum, this is an instance in which "efficiency" and "fairness" concerns coincide. Limiting the number of citable dispositions (already enormous and growing exponentially without the proposed rule) helps limit resources spent on litigation instead of on more productive endeavors. Limiting citable authority also keeps litigation narrowly enough focused on truly valuable legal research that litigants and lawyers without unlimited resources still have a chance to compete.

Finally, given the considerable controversy surrounding the proposed rule, it seems odd that the Administrative Office would not allow individual circuits to decide for themselves rather than impose a single rule on the entire country. If, contrary to my view, unpublished dispositions are valuable to judges in deciding cases, and can be used at relatively little cost to litigants, circuits that do not allow unpublished dispositions to be cited will change their rule. If evidence from experimentation with citation to unpublished dispositions points in the opposite direction, as I think it will, circuits will switch to the rule that I believe to be both more efficient and fair, which is to prohibit their citation. This is a matter that should be decided by the judges themselves, who in different circuits confront different circumstances and who are familiar with both their own workload and the burden that citing unpublished dispositions would impose on litigants. I strongly urge your Committee to reconsider.

Very truly yours,

Richard W. Painter
Guy Raymond and Mildred Van Voorhis Jones Professor of Law
(217) 333-0712