United States Court of Appeals
for the Federal Circuit
THE NATIONAL COURTS BUILDING
717 MADISON PLACE, N.W.
WASHINGTON, DC 20439

CHAMBERS OF
S. JAY PLAGER
SENIOR CIRCUIT JUDGE

202/633-5866

03-AP-297

February 2, 2004

Mr. Peter G. McCabe
Secretary to the Rules Committee
Rules Committee Support Office (OJP-RCSO)
Administrative Office of the U. S. Courts
Washington, D. C. 20544-0001

Dear Mr. McCabe:

You have received a letter from Chief Judge Mayer of our court expressing the opposition of the judges of the court to three of the proposed changes to the Federal Rules of Appellate Procedure. I will not repeat the cogent arguments against these changes set forth in his letter. I will only add the following personal observations regarding these proposals.

The proposal that nonprecedential opinions may be cited by litigants (despite our local rule to the contrary) reflects a lack of understanding of how courts operate. In our court, precedential opinions are circulated to non-panel judges in advance of their publication, and are subject to objection and en banc review if other judges believe a statement of law contained in the opinion is erroneous or unsupported. (The specific outcome in the case generally is not open to review in this manner, unless a change in the stated rule of law necessitates such result.)

This circulation process means that all proposed precedential opinions are reviewed in all chambers, resulting, in some cases, in an exchange of memos between non-panel judges and panel judges, and, when justified, some modifications to the opinion, even when en banc review is not called for. This is time and energy consuming for all judges and chambers staff, but helps ensure uniformity and consistency regarding applicable rules of law.

Nonprecedential opinions are not circulated in this manner. Authoring judges and panels, of course, are obligated to follow the court's precedents, but the exact phrasing and application of law in a given nonprecedential opinion, because it is not citable as precedent, does not require the same court-wide scrutiny.

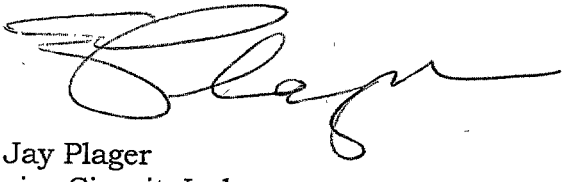
Cases of importance or of broad significance, or which raise important new issues of law, properly require precedential treatment. However, many appeals to this court have limited merit, or are of little significance beyond the immediate parties. Some of these are disposed of with a simple affirmance under Rule 36; others are disposed of in a nonprecedential opinion, which allows us to write some explanation for the benefit of counsel and the litigants when that seems needed, without burdening the court with exhaustive writing and review responsibilities.

A rule that all opinions are to be citable as precedent, in effect doing away with the distinction between precedential and nonprecedential opinions, will have one of two results. Either there will be more opinions requiring full circulation and review, substantially extending the already lengthy process of opinion writing and publication before litigants know the outcome of their case; or many, if not most, cases that formerly were decided with nonprecedential opinions will be disposed of by Rule 36 summary dispositions.

Since the court's workload remains very heavy, and our judges are sensitive to the need to dispose of cases promptly, the latter is the most likely outcome, even though it is the least desirable from the viewpoint of litigants and counsel. Obviously, neither alternative is good for the bar, for litigants, or for the judicial process. The proposed rule change should be rejected.

The other two proposed changes are equally ill-considered, though somewhat more technical; I have nothing to add to Chief Judge Mayer's discussion of these. In my view, the FRAP is designed to assist courts and litigants in the fair and efficient administration of justice, not to micromanage the work of judges or to supersede local rules tailored to individual court situations when national uniformity is not needed or desirable.

Very truly yours,



S. Jay Plager
Senior Circuit Judge