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February 12, 2004

Via Facsimile (202) 502-1755

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: Opposition to Proposed Revision of FRAP 32.1

To the Committee:

I am writing in opposition to the proposed revision of Rule 32.1, which would prohibit any circuit from restricting or prohibiting the citation of judicial opinions, judgments, or other written dispositions that are unpublished. This revision, if enacted, promises to burden lawyers with extensive research of opinions that have no legally binding effect, and removes from individual circuits the power to decide for themselves whether their unpublished opinions should be cited as authority.

First, if unpublished decisions can be cited to a court, a lawyer must research and analyze both published and unpublished opinions. If that lawyer is on the less-well-funded side of the litigation, this is especially burdensome. For example, some public defender offices and panel attorneys face severe shortages in funding and simply do not have the budget or manpower to research unpublished circuit decisions. There are thousands and thousands of unpublished decisions that recite potentially helpful language for a litigant and an effective lawyer would be required to find those cases – even though those dispositions were never intended to provide an analysis that would bind the courts of the circuit. Many of these opinions may even contain misleading or inaccurate statements of law due to the often imprecise and unclear writing, requiring painstaking analysis by the researcher. Moreover, would the lawyer now be required to cite to unpublished decisions from the circuit that are directly adverse to the position of the client?[1]

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[1] Compare to Rule 3.3 of the ABA Model Rules of Professional Conduct:
(a) " A lawyer shall not knowingly ... (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel ... ."

Second, the decision to prohibit or restrict the citation of unpublished decisions should be made locally. It is the circuit itself that decides whether it will publish or not publish a particular decision; it is a local rule that governs the content of briefs, the format of briefs, time limits, and the like. If the judges of the circuit believe that the best way to maintain order over the law of that circuit and the disposition of that circuit's cases is to prohibit or restrict citation to the circuits' unpublished decisions, those judges should have that authority. A uniform rule is simply inappropriate when the federal circuits vary so considerably in size and caseload.

I thank you in advance for your consideration of these comments.

Sincerely,

Jennifer Schlotterbeck
Assistant Federal Public Defender