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To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Comment on Proposed FRAP 32.1

03-AP-407

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. McCabe:

I write in strong opposition to the proposed Federal Rule of Appellate Procedure 32.1 ("FRAP 32.1") that is currently under consideration by your committee. I am an attorney in private practice at Cleary, Gottlieb, Steen & Hamilton and have been resident in the firm's New York and London offices, and was previously a law clerk at the U.S. Court of Appeals level. I have closely followed the proposal of FRAP 32.1 and related efforts to permit the citation of unpublished dispositions, and have concluded that the adoption of such a rule is an uncommonly bad idea that would profoundly hamper the ability of federal appellate judges to effectively deal with the cases before them.

As you are no doubt aware, caseloads at the federal appellate court level are overwhelming. The sheer volume of cases -- which looks set to increase for the foreseeable future -- makes it impossible for every case to receive the detailed and time-comsuming analysis required to write a precedential opinion. Cases that can be decided based on existing precedent can and should be determined in an unpublished disposition that is directed solely at the parties in the case at hand. It does not make sense to require that such unpublished dispositions be treated as precedent, as the reasoning behind such decisions is entirely different from the reasoning employed in a published opinion. While a published opinion is intended to develop a circuit's case law in novel, conflicted or particularly difficult areas of law, an unpublished disposition is intended solely to resolve a particular controversy between particular litigants. Because unpublished dispositions are not available for citation in future cases, judges are not required to undertake the painstaking and meticulous process of considering unintended effects of their unpublished opinions -- and of preventing them from being misinterpreted in the future. By permitting judges to designate certain cases as precedential opinions and others as unpublished dispositions, court rules are acknowledging the undeniable fact that each case does not deserve -- and indeed cannot receive -- the time and attention that must be devoted to published opinions that can be cited in the future as statements of law by the circuit.

If FRAP 32.1 were adopted, the benefits of unpublished dispositions would be eviscerated and the consequences for federal appellate courts would be dire. If judges are forced to provide full-blown published opinions for citation in each case that they hear, the appellate judiciary would grind nearly to a halt -- and the already lengthy time between panel hearings and issuance of a disposition would increase exponentially. Seeking to avoid this scenario, many panels would be tempted to offer no reasoning at all for certain of the opinions they issue, preferring to issue an order of "affirmed" than risk setting confusing, conflicting or poorly considered precedent for citation in future cases. Surely the committee does not intend to promote a judiciary that provides no analysis at all to litigants -- or to the U.S. Supreme Court, which would find it harder to review petitions for certiorari based on summary decisions at the appellate court below.

Further, if judges do provide reasoning for their opinions, the number of published opinions will mushroom, increasing the chance of conflicting precedent and requiring attorneys to evaluate ever more published dispositions. Enterprising lawyers will no doubt seize on this proliferation of precedent to point out linguistic or other minor differences in circuit case law that favor their client. Judges' inability to focus sufficient attention on published opinions under a FRAP 32.1 regime would likely increase ambiguities residing in circuit precedent. As more cases become available for citation, moreover, lawyers will be

required to analyze precedent searching for a favorable angle or ambiguity. FRAP 32.1 would thus increase the cost of representation for litigants, who would require additional lawyer hours to review precedent -- or risk being at a significant disadvantage to better funded adversaries.

In sum, unpublished dispositions that cannot be cited as precedent are an essential tool that must be available to appellate judges to permit the judiciary to operate efficiently. The option of judges to decide straightforward cases through such unpublished dispositions helps appellate courts to tackle their growing caseload by permitting decisions to be directed solely at the parties to a certain case. Judges can thus determine a particular controversy based on existing caselaw -- a role that is central to their jobs as jurists -- without having to write a published opinion that forms precedent for all future litigants in the circuit. If FRAP 32.1 were adopted, the ability of judges to dispose of cases in this manner would be eviscerated -- and the consequences for the federal judiciary would be profound.

I hope that these views are helpful to the committee as it considers FRAP 32.1, and I sincerely hope that the propsed rule is not adopted.

Please feel free to contact me via the contact information below if I can expand on these thoughts or otherwise be helpful to the committee in its deliberation process.

Sincerely,

John McGuire

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