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February 10, 2004

Mr. Peter G. McCabe  
Secretary, Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
Washington, D.C. 20544

03-AP-426

Re: Comment on Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I am a former Law Clerk/Technical Advisor to the Hon. Helen W. Nies (deceased) of the United States Court of Appeals for the Federal Circuit. I write to express my views on the adoption of proposed Federal Rule of Appellate Procedure 32.1. I am aware that some of my fellow former clerks have expressed opposition to the proposed Rule. I am also aware that the Federal Circuit Judges have expressed their opposition. I have a different view.

I submit that non-precedential opinions should be citable with at least the same dignity as an article written by lawyers in the field, for example. One might well argue, "if a Judge wrote it, then an advocate should be able to cite it." I do not agree with the fears expressed by some that allowing such citation will adversely affect the quality of justice. Rather, I think it will improve justice to allow citation of judicial decisions, even if they are not "binding" (indeed, one questions how any court could be permitted to render a decision that combines law and facts and then act as if the decision had never happened). If a Court took the time to write it, why should it be less citable than an article by non-judges and which also has no binding precedential stare decisis value? Precluding the decision from being "binding" will obviate the Federal Circuit's concern that their own rules preclude a panel from overruling an earlier panel on the law (in fact, some might say that the use of non-precedential opinions encourages the very practice the Court seeks to avoid).

That is where I would draw the middle ground. Non-precedential decisions are citable, but not as binding precedent, but for the same value that may be derived from the statements of others on the topic.

Thank you for your time and consideration of these comments.

Very Truly Yours,

  
Kurt L. Grossman