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03-AP-430

February 16, 2004

VIA FEDERAL EXPRESS

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

Re: Opposition to Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I am a former law clerk to the Honorable S. Jay Plager of the United States Court of Appeals for the Federal Circuit. I write in my individual capacity as a practicing attorney.

I believe that allowing citation of non-precedential dispositions would adversely affect the administration of justice. The issuance of non-precedential opinions permits appellate judges to concentrate their opinion writing efforts on cases involving important and precedent-setting issues.

Historically, non-precedential opinions have been relatively short because they are written for the parties. Therefore, a full exposition of the relevant facts is not necessary and is often omitted. This appropriately provides a method to resolve the case while briefly explaining the court's rationale. To now allow citation of such opinions without the benefit of the full factual background may give the appearance of inconsistency with existing precedential opinions. It may also result in a significant increase in the caseload of the appellate courts for the sole purpose of clarifying language from opinions that were never intended to be precedential or to need such clarification. The Rule, if adopted in any form, should not apply retroactively.

The appellate courts themselves appear to be in the best position to determine whether an opinion sets forth precedent-setting matters. If a court believes that an opinion does not set forth precedent-setting matters, then a reading of such opinions to imply the opposite suggests

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a misreading. Proposed Federal Rule of Appellate Procedure 32.1 may lead to an increase in such misreadings.

With respect to the Federal Circuit, to the extent that any person, not just a party, believes that a non-precedential opinion should be made precedential, Federal Circuit Rule 47.6(c) allows that person to ask the Court to make the opinion precedential. This allows the Court the opportunity to add whatever additional information the Court deems necessary to allow a reader unfamiliar with the facts of the case to understand the bases for the holdings set forth in the opinion.

Thank you for your consideration of these comments.

Respectfully submitted,



Bruce Wieder

BW/lp

cc: Hon. Samuel A. Alito, Jr.
Chairman, Advisory Committee on Appellate Rules