NORTHWESTERN UNIVERSITY SCHOOL OF LAW

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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

Re: Proposed FRAP 32.1

Dear Mr. McCabe:

I am a former clerk (1978-79) to Judge Alfred T. Goodwin of the Ninth Circuit Court of Appeals, and am admitted before the Seventh Circuit Court of Appeals here in Chicago. I write to oppose adoption of proposed Federal Rule of Appellate Procedure 32.1, which would override local rules that now prohibit the citation of unpublished case dispositions as precedent in subsequent cases.

Enactment of the proposed rule would be a large mistake, in my opinion, for many reasons. First, as you know, different circuits have different rules concerning use of unpublished dispositions, indicating that what works best in one circuit is not the optimal rule in others. The strength of a federal system is precisely the ability to tailor rules (procedural as well as substantive) to local conditions. Enactment of FRAP 32.1 would obviously be at variance with this basic advantage of our federal legal system.

Second, I know from experience that a decision not to publish a disposition indicates that the matter was considered relatively routine, and thus that less time goes into writing the disposition. This is as it should be: less complex matters should indeed absorb less of courts' time. But inevitably, if the disposition may eventually be cited, a judge will have to spend more time summarizing in greater detail the facts of the litigation, explaining more elaborately the reasons for the court's disposition, and so forth. It makes no sense to have valuable judicial resources consumed in matters that simply do not require a great deal of time in order to dispense justice.

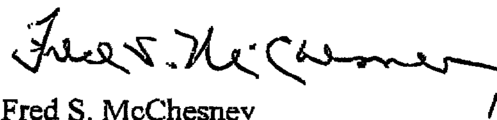
Moreover, the proposed rule contains within it the potential for much mischief. A court could still issue opinions as "unpublished," but would have to allow them to be cited. The Committee Note on the proposed new rule states, however, that while a court could still issue a disposition as "unpublished," the rule "says nothing about what effect a court must give to one of its 'unpublished' opinions or to the 'unpublished' opinions of another court." At least two problems are immediately foreseeable.

First, a no-citation rule is clear, easily understood and easily applied. That can hardly be said of the proposed new rule, given that nothing is being said about what effect, if any, courts would give to "unpublished" dispositions. The failure to specify what a court is to do when "unpublished" dispositions can be cited introduces irresponsible confusion into the system.

In addition, the ease of finding and learning the law – I speak here as a former practicing attorney and as a legal educator – must invariably suffer. If courts can issue a disposition as "unpublished," either it will become harder to find or new, "unofficial" sources of "unpublished" opinions will arise. Since the issuing court did not feel the matter of sufficient precedential importance to file it as a published opinion in the first place, it makes little sense to put the bar to the task of trying to find matters that the courts have already indicated have no precedential value. To say that the "unpublished" opinions can be found on websites hardly answers this criticism. They still would have to be located and read, consuming litigator time (and so client money) to no good purpose. Adding expense to a system popularly viewed already as very costly is scarcely desirable.

There are other points that could be raised against proposed FRAP 32.1. I hope, however, that these points are sufficient to cause the proposed new rule not to be enacted. It would serve no useful purpose, and would create needless confusion and expense. It would be particularly anomalous in a federal legal system otherwise characterized by different courts' choices of the rules that work best for them.

Sincerely,



Fred S. McChesney