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December 2, 2003

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

03-AP-
045

Re: Opposition to Proposed FRAP 32.1

Dear Mr. McCabe:

I write in opposition to proposed Federal Rule of Appellate Procedure 32.1, which would compel the courts of appeals to allow the citation of "unpublished" and "non-precedential" dispositions. Although the proposed rule purports to relieve a "hardship" on practitioners, it would in reality do just the opposite. Because the unintended consequences of proposed FRAP 32.1 would be to impede the fair and efficient administration of justice rather than to advance it, I urge that the rule be rejected.

In opposing FRAP 32.1, I speak not only as a civil procedure professor but as an attorney who has practiced for eight years, mostly in the federal courts. Based on this experience, I believe that the proposed rule will be harmful to lawyers and their clients – especially those of lesser means – as well as to the quality of the work product generated by federal appellate courts. As the comment accompanying the proposed rule notes, approximately 80 percent of appellate decisions in recent years have been designated unpublished. This is done for a very good reason: It takes time to craft an opinion that is appropriate for citation as either persuasive or binding precedent.

The decreased percentage of published opinions over the past several years does not, in my view, reflect laziness on the part of judges who sit on our courts of appeals. It is not, in other words, a function of their unwillingness to do the hard work of writing clear and well-reasoned opinions. Instead, the decreased number of published opinions reflects the practical inability of the dedicated judges who sit on the federal appellate bench to generate opinions suitable for publication due to their ever-increasing dockets.

FRAP 32.1 would exacerbate the problem of limited resources that exists in the federal circuit courts. To the extent that every disposition is fair game for citation in future cases, the rule will require appellate judges to spend considerable additional time crafting opinions suitable for citation as authority. The predictable result of this change will be to increase the already-lengthy waiting time in many circuits – sometimes over a year or even two years – between the filing of appeals and their eventual disposition, while decreasing the quality of precedential opinions that emerge from those courts.

To the extent that some courts allow the citation of unpublished opinions without suffering increased delay or a decline in the quality of their work product, they deserve credit. But for other circuit courts, which are struggling to manage their large and ever-increasing dockets, proposed Rule 32.1 would only make things worse. The circuit courts should be left with the authority to manage the citation of cases under their jurisdiction. The rule change is especially troubling, given that the rule would appear to allow the citation to unpublished dispositions issued before its effective date – dispositions undoubtedly written by courts with the expectation that they would not be cited as precedent in that circuit.

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The note accompanying the proposed rule states that allowing the citation of unpublished opinions would relieve a "hardship" on practitioners who practice in multiple circuits. This contention is untenable. It is no hardship to expect lawyers to read and follow the rules of each jurisdiction in which they choose to practice. The committee note's contrary suggestion proves to much, for it would suggest that *any* variation in the rules from circuit to circuit creates an undue hardship on lawyers practicing before them.

In fact, the unintended consequence of proposed FRAP 32.1 would be to increase rather than decrease the burden on practitioners. As things presently stand, lawyers practicing in circuits that disallow citation to unpublished decisions are relieved of the burden of researching those cases. If the rule is changed to compel circuit courts to allow citations to unpublished dispositions, then lawyers who fail to cite those decisions will run the risk of committing malpractice Given that roughly four-fifths of appellate decisions are now unpublished, this change can be expected to result in a fivefold increase in the number of in-circuit cases that practicing lawyers must research and read, if they are to perform their jobs competently. In comparison to this substantial increased burden on conscientious attorneys (not to mention their clients who must pay their bills), the supposed "hardship" arising from a lawyer's obligation to check the circuit rules before filing a brief is trifling.

For well-financed litigants, the additional labor imposed by this change in the law may be manageable. Wealthy litigants can presumably afford to spend more money to fund a team of lawyers to conduct the additional research that proposed FRAP 32.1 will require. The real brunt of this rule will be borne by litigants of limited means – those who cannot afford to shell out the funds needed for their lawyers to conduct limitless research into the vast trove of unpublished dispositions. Impecunious litigants will therefore be put to an even greater disadvantage by this rule than that under which they currently labor.

As someone who has practiced in the federal courts for several years, I understand the frustration that lawyers sometimes feel when they come across an unpublished disposition that they are unable to cite in an appellate brief. In a world where both judges and litigants had unlimited time and resources, there would be no reason for disallowing citation to unpublished decisions. Unfortunately, we do not live in that world and surely will not see it during our lifetimes.

In the real world, the federal courts must administer the best possible justice with the limited resources available to them. For the most part, they do so remarkably well. Proposed FRAP 32.1 would impede rather than advance their ability to fulfill this mission, with especially pernicious consequences for litigants of limited means.

For these reasons, I oppose proposed FRAP 32.1. Thank you for your consideration of my views.

Sincerely,

Daniel P. Tokaji
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