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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, D.C. 20544

Re: Proposed FRAP 32.1 (citation unpublished decisions)

Dear Secretary McCabe:

I'm writing to express my opposition to a proposed amendment to the Federal Rules of Appellate Procedure that would add a new rule, FRAP 32.1, permitting citation of unpublished decisions. I think it's a bad idea.

I understand that the issue concerning whether or not unpublished decisions should be cited is not new. Currently, each federal circuit has its own rules addressing the subject which differ in some respects and overlap in others.[1] The battleground is mapped between Judge Arnold's opinion in *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) and Judge Kozinski's opinion in *Hart v. Massanari*, 266 F.3d 1155, 1175-80 (9th Cir. 2001).[2]

Although I tend to agree with Judge Kozinski's conclusions on this issue, I have an open mind and am prepared to confess error. Judge Arnold's views merit attention and study. It may well be that

[1] *See* The Honorable Richard S. Arnold, "Unpublished Opinions: A Comment," The Journal of Appellate Practice and Process (http://www.ualr.edu/~appj/ARNOLD>HTML) (Last visited 11/22/2003); *see also* The Honorable Alex Kozinski and the Honorable Stephen Reinhardt, "Please Don't Cite This!," California Lawyer (June 2000).

[2] Judge Arnold instructs that Article III precludes federal courts from failing to acknowledge prior decisions. Judge Kozinski notes that the concept of precedent is simply a construct of judicial administration and not constitutional import. In evaluating these positions, I acknowledge that Judge Arnold makes several compelling points. However, I respectfully believe that reliance on unpublished decisions does not invite the mischief he perceives. For example, current practice in the Ninth Circuit generally prohibits citation to unpublished decisions, but allows citation in certain isolated circumstances one of which is where necessary to avoid an inconsistent result. *See* Ninth Circuit Rule 36-3.

Judge Arnold's perspective will be accepted as correct in due time. However, we aren't there yet. Indeed, somewhat curiously, proposed FRAP 32.1 does not embrace Judge Arnold's position. FRAP 32.1 does not ascribe any weight to unpublished decisions. It does not require that courts accept or treat unpublished decisions as precedent. But it nevertheless compels courts to accept citation of such decisions. Consequently, courts are obligated to entertain decisions which may otherwise serve no useful purpose. I'm not sure I see the advantage.

From what I can tell, the chief argument in favor of adopting FRAP 32.1 is standardization (adoption of one uniform rule to govern all federal appellate practice). Standardization is good. The federal circuits, however, do not share precisely similar problems and needs. Federal case management statistics are available on-line at the Administrative Office's website, http://www.uscourts.gov. The numbers are telling. Over 11,000 appeals were filed in the Ninth Circuit in 2002 with over 5,000 terminated on the merits. No other circuit comes close. It's not clear to me that a rule that might work well in, say, the Third Circuit will have the same beneficial effect in the Ninth or Fifth Circuits. But, at a minimum, I think we should let the Article III Circuit Judges in each circuit make the call as to what sort of procedures best serve their respective circuits on this issue.

In contrast to this one perceived advantage, I can think of multiple problems with the proposed amendment, but four in particular stand out.

First, it will greatly slow down the decision-making process. At present, the Ninth Circuit (the circuit with which I am most familiar) is often able to release Memoranda Dispositions within days of oral argument. If such decisions are going to be cited, the court will undoubtedly need and take much more time before releasing each decision to ensure that its import is intelligible to future litigants and panels. In turn, the time that will be spent clarifying unpublished decisions will be taxed against time that would have been spent on opinions.

Second, large corporations or government agencies will gain an unfair advantage by virtue of their ability to amass institutional databases containing such decisions. Appeals in several categories of cases (immigration, environmental, criminal) will become exercises in chain-citing obscure dispositions.

Third, requiring that courts accept citation of unpublished decisions encroaches upon the ability of each court to decide whether and how its voice should be heard. The proposal also needlessly burdens the exercise of each circuit court's discretion to adopt rules regulating practice. Article III Judges represent the best minds we have. If we repose our trust in them to decide the most compelling issues of the day, we should trust their discretion to prudently administer practice and procedure.

Fourth and finally, I'm concerned that reliance on unpublished decisions will obscure the court's voice. Practicing members of the Bar rely on the court's precedent to predict and advise. We may not always agree with the court's instruction, but we try to at least understand it. If, however, we are required to read, brief, argue, and interpret the court's voice through a dense filter of unpublished decisions, the measure and magnitude of our errors will inevitably increase to no one's gain.

In sum, I see few advantages and several problems to FRAP 32.1. I urge rejection of Frap 32.1. Thank you for considering my views.[3]

Very truly yours,

JABURG & WILK, P.C.

Gregory S. Fisher

[3] I should note that the views expressed in this letter are mine alone and may or may not be shared by others in my firm.