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VIA FAX (202) 502-1755

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

Re: Proposed FRAP 32.1

Dear Mr. McCabe:

We write this letter in opposition to Proposed FRAP 32.1. We are lawyers who have practiced in the federal courts for a combined 50 years. We've done so for most of that time as lawyers in a medium-sized law firm of approximately 130 lawyers. We oppose the proposed rule for the following reasons:

First, federal courts of appeal sometimes decide to designate an opinion as unpublished because the quality of appellate advocacy was such that a genuine concern exists as to whether the issues were adequately briefed and argued. We cannot expect the appellate courts, with limited resources, to independently brief every issue presented by every case which is appealed to them. They may well render decisions which would not have been rendered had all of the issues been sufficiently briefed. Many areas of the law are specialized and the courts of appeal do not regularly examine issues in them - for example, environmental law, antitrust law, patent law. Appellate judges cannot reasonably be experts on all subject matters, and clerks right out of law school are experts on none. Erroneous decisions may result, due to unfamiliarity by counsel, clerks, and judges with the issues. An appellate court should have the discretion to designate a particular opinion as not publishable, rather than feel pressured independently to exhaustively brief every issue which is discussed in the opinion.

Second, if FRAP 32.1 is appropriate for the federal courts of appeal, does it not follow that a comparable rule is appropriate for the state courts of appeal as well as for the federal and state courts of primary jurisdiction. The rule not only will make legal research, brief preparation, and argument much more burdensome and expensive in the federal courts of appeal, but potentially will do likewise for all courts.

Third, the Advisory Committee comments that approximately 80% of the opinions issued by the courts of appeal are designated as "unpublished," suggesting that under the rule there will only be a quintupling of the opinions to be reviewed by counsel. However, essentially no opinions of the courts of primary jurisdiction are "published" and yet under the rule potentially all available decisions of any court will have to be considered for their persuasive value, to avoid the specter of professional malpractice - an entirely unwelcome burden.

Fourth, the Advisory Committee suggestion that under the rule there will be a level playing field as to availability of unpublished decisions is unwarranted. However available may be unpublished decisions of the federal courts of appeal, there is no comparable availability of "unpublished" opinions of state courts of appeal and of state and federal courts of primary jurisdiction.

Fifth, if all unpublished opinions are grist for the federal courts of appeal, does it not logically follow for the same reasons that any printed or unprinted material wherever found, including everything on the internet, should be equally citeable for its persuasive effect. While parties to litigation may on occasion cite such materials, to specifically authorize their use by rule is a wholly different matter as it invites their wholesale use. The rule is the proverbial nose of the camel as to unpublished material, when the more appropriate approach to such material is to start considering restrictions. Is there to be no possible persuasive stone unturned?

Sixth, for the Advisory Committee to assert that Rule 32.1 takes no position on the precedential value of "unpublished opinions," is practically misleading. The very fact that the rule permits the citation" of unpublished" opinions, means that there will be a tendency for lawyers and judges to treat them as a source of authority.

Seventh, the Advisory Committee in support of the rule comments that the disparate circuit rules regarding the citation of unpublished opinions creates a hardship for practitioners who practice in more than one circuit. To the extent that is true, the solution is not to permit the citation of such unpublished opinions in all circuits, but to restrict their citation in all circuits.

Eighth, logically if both unpublished and published decisions are citeable to the courts of appeal, why should the latter have any less precedential value. Is the court that originally rendered the opinion and determined whether it should be published, any more capable of deciding whether the case should be accorded precedential value than is the court of appeal to which the case has been cited? If logically both published and unpublished opinions are to be accorded precedential value, then all too much law is created such that it becomes a practical impossibility for the public to know and follow the law.

Ninth, the fact that unpublished decisions may be cited in the courts of appeal will cause some judges to render no opinions to the detriment of the parties in the underlying cases, or in the alternative will unnecessarily delay their decisions while they craft opinions which opinions should only have significance to the parties.

In short, for these and other reasons, Rule 32.1 should not be adopted.

Sincerely,

Arthur Fine
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