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BY FAX

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

Dear Secretary McCabe,

I write to express my opposition, as a former litigator with experience in many federal and state appellate courts, to the proposed FRAP 32.1 requiring courts to allow citation of unpublished opinions. As I am sure you have, I have read several pieces of commentary from appellate judges, academics, and columnists explaining why the proposed rule would be counterproductive from the standpoint of public policy and of the courts themselves. I find those arguments persuasive. In addition, the rule would do more harm than good from the standpoint of practitioners like me.

The appellate courts' heavy reliance on unpublished opinions to dispose of cases is an acceptable, if regrettable, way for them to address their ever-growing caseloads; judges can devote their time and attention to the minority of opinions in the more difficult or important cases that set precedent, rather than to the majority of cases that don't. If unpublished opinions were required to be cited, judges should—and, I assume, would—devote more time to the unpublished opinions they issue, to ensure they were "cite-worthy." There are only two ways they could do so, neither of which is satisfactory.

The first is to take time away from their published opinions, which would reduce those opinions' clarity and usefulness as precedent. It takes a large investment of time, with many drafts and many pairs of eyes, to think through the ramifications of a holding and supporting explanation on the many imaginable future cases that will look to it as precedent. Taking some of that time away will inevitably produce case law that is harder to apply and easier to argue both sides of in a later case—in short, case law that is less useful to me as precedent.

If judges want to preserve the time they spend on published cases while still devoting more effort to each unpublished opinion than they do today, their second and only other alternative is to write far less unpublished opinions and dispose of more cases with no opinion at all. That result hardly advances the aims of the proposed rule and is fundamentally unsatisfactory to the litigants in the case being decided.

My greatest concern as a practitioner, however, involves the unpublished opinions themselves. Requiring courts to allow their citation will increase the time necessary for legal research and analysis; lawyers will feel compelled to wade through a thicket of unpublished opinions in hopes of finding something useful. Even worse, they pose a danger of muddying rather than clarifying the law. Given the number of cases involved, judges will still not be devoting nearly the amount of time to unpublished opinions as to published ones. They will therefore contain less description of the case's facts and more inconsistencies, ambiguities, and (as we must admit happens) plain old bad reasoning. Much of the time, something in an unpublished case that one side points to as a key on-point holding is really off-point or imprecise. Opposing lawyers will need to spend more time (and precious brief space) trying to clear up this mud. (Indeed, it seems likely that the practitioners who support the rule hope to use some of the less-perfect law in unpublished opinions to win cases that better law suggests they should lose.)

Finally, the proposed rule does not improve the situation by not requiring courts treat these opinions as binding precedent. All of the problems described above hold true whether an opinion is potentially binding or merely potentially persuasive. And in my experience, 90 percent of the debates in court over cited cases concern whether a holding truly applies; the binding/persuasive distinction is irrelevant. Furthermore, it seems unlikely that a district court, when faced with an nominally non-binding unpublished opinion from its own circuit's court of appeals, will be willing to ignore it or dismiss it as "unpersuasive."

In short, the proposed rule will not well serve any of the groups—not the courts, litigants, or practitioners like me. Different circuits have different rules on this topic; that is appropriate, given their very different case loads. I strongly recommend that the proposed rule not be adopted and that the circuits be left to address these issues themselves, as they do today.

Yours truly,

Robert K. Niewijk
Member, bars of the 2nd, 4th, 5th, and 7th Circuits and the U.S. Supreme Court