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

RE: Proposed FRAP 32.1

Dear Mr. McCabe:

As a law professor who has written about judicial decision making and judicial opinions, I write to express my opposition to the proposed Federal Rule of Appellate Procedure 32.1. Although similar rules have been implemented in some courts, I believe this rule could have undesirable consequences, and that its main aims could be accomplished in other ways.

Those who oppose this rule say that if courts must permit citation to all cases, they will then need to expend much more time making all their decisions sufficiently complete to be cited. Those who favor the rule have noted that courts need not spend additional time making short opinions more detailed, because they are free to treat citations to unpublished opinions as merely persuasive or illustrative, rather than binding.

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This response seems overly simple to me. When judges write unpublished opinions, they often have in mind as an audience the parties to the case and the lower court judge. The appellate panel can safely assume that this group understands the facts and procedural history, and the main arguments that might be made on each side. The panel cannot assume that other lawyers or other panels of the circuit will understand these details when future cases arise. Were unpublished opinions citable, judges would need to consider whether their brief comments might be misunderstood years later by lawyers or judges who did not know the details of this case or the arguments that were advanced.

Caution about such misunderstanding would naturally lead judges to one of two solutions, both of which are undesirable. Judges might write even shorter opinions, offering little information to the parties or lower court judge, in the hope that by saying little their words would not later be misunderstood. This would deprive litigants of an explanation, and lower court judges of a chance to understand how an appellate court believed they erred. Alternately, judges might feel the need to take much more time writing detailed opinions, just to avoid later misunderstandings. This would be an unfortunate waste of resources.

Once one sees the problem in this way, one can no longer assume that its solution lies in allowing appellate courts to treat unpublished decisions as merely persuasive. These decisions have the potential to mislead later panels about the thinking in prior cases. Avoiding this outcome is likely to lead judges to write opinions that are either less useful or less good uses of their time.

The most persuasive justification for FRAP 32.1 is, I believe, preventing courts from making decisions in individual cases that they are unprepared to make as general law. Obviously, this practice would raise serious concerns for the rule of law. I see no reason to believe this practice to be widespread. But even the perception that it happens is harmful to the judicial function.

Because some people appear to suspect courts of hiding consequential decisions in unpublished form, it seems that some efforts must be taken to bolster confidence that courts to do not engage in this behavior, and – in case it ever actually happens – to deter the behavior itself. However FRAP 32.1 is not necessary for this goal, and indeed would not accomplish the goal very well.

The rule would not really help to deter bad behavior, or to increase confidence in courts, because judges determined to disguise deviant cases as inconsequential could do so by writing opinions that say very little.

The rule is not needed because other less intrusive measures could address legitimate concerns. For example, most courts already provide means for parties, dissenting judges, or other judges on the circuit, to request publication of decisions initially designated as non-published. These rules substantially limit the ability of judges to make secret law. If these

measures are thought insufficient, they might be strengthened in various ways. For example, the decision not to publish after a party request could be subject to review by judges off of the panel. Or rules might be adopted mandating publication based on agreement of the parties, or documentation of public interest – such as by petition. No doubt such measures have costs. But they are likely to be less harmful to effective judicial administration than is FRAP 32.1.

Respectfully,

Scott Altman