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RESPOND TO ALBANY OFFICE

February 3, 2004

Mr. 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: Comments to Proposed FRAP 32.1

Dear Mr. McCabe:

This letter is to express my opposition to amending FRAP 32.1 to allow citation to unpublished dispositions as authority in all federal courts.

I am the Federal Public Defender for the Districts of Northern New York and Vermont (Second Circuit). I was previously Federal Defender for Southern Alabama (Eleventh Circuit) and an Assistant Federal Public Defender in Eastern Texas (Fifth Circuit). From those experiences, I can attest that allowing citation to unpublished dispositions is not a good practice.

Unpublished dispositions are typically case-specific and fact-bound. Their holdings are difficult to apply to other cases. However, this deficiency is unlikely to deter lawyers from citing them, despite their inapplicability to different facts. This invites disingenuous arguments from the parties. Even lawyers who wish to avoid comparing such anomalous decisions will feel bound to cite them for fear of omitting relevant authority.

Unpublished dispositions tend to be less well written than those reported. No doubt, judges are especially circumspect with their prose when it is for official publication. Anyone would try to be more careful writing something published nationally than a message merely intended for a few persons. Circulating the unpublished work is unlikely to improve its quality. Instead, judges will just make them shorter, and thus less helpful to the litigants in that case.

Although the rule change is not meant to give precedential weight to unpublished dispositions, such results will be impossible to avoid. Except for published decisions, any other persuasive authority will be held in lower esteem than unpublished dispositions from federal

courts of appeal. Lower courts will feel compelled to treat unpublished opinions as controlling.

Legal research will also be more complicated. Although Westlaw does collect unpublished dispositions, they do not contain headnotes and are not summarized. Searching through the text of these cases for common phrases will at best be a scattershot proposition. Anyone without unlimited access to computer assisted legal research will be at a distinct disadvantage.

Some courts do allow citation to unpublished dispositions by local rule. The Second Circuit does not. There is no reason to make the practice uniform. This is exactly the type of policy best addressed by local rule. Please leave it to the culture of each circuit.

Respectfully,

A handwritten signature in black ink, appearing to read 'A. Bunin', with a stylized flourish at the end.

Alexander Bunin
Federal Public Defender
Northern New York & Vermont