UNITED STATES TAX COURT
WASHINGTON, DC 20217

CHAMBERS OF
MARK V. HOLMES
JUDGE

February 12, 2004

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 New Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I am writing to the Committee to state my opposition to the adoption of proposed new FRAP 32.1. While these comments are of course mine alone, this Rule would needlessly make the jobs of all my colleagues more difficult, as I am sure it would the jobs of the appellate judges who would be most directly affected. The rule is an excellent example of a solution in search of a problem - it would increase the costs of litigation, put *pro se* litigants at a disadvantage, and inefficiently divert judicial time and effort away from the most difficult cases. The Committee should reject it.

Why propose abolishing noncitation rules for unpublished opinions? The draft Committee note gives four reasons:

- It would make available for citation a new source of analysis useful "by virtue of the thoroughness of its research or the persuasiveness of its reasoning."

- It would eliminate the "hardship for practitioners" of facing nonuniform local rules.

- It would be costless -- judges wouldn't change their current practice of devoting more time to precedential than nonprecedential opinions just because the latter could now be cited.

- It better reflects the reality of legal research today -- "[i]n almost all of the circuits, 'unpublished' opinions are as readily available as 'published' opinions. Barring citation to 'unpublished' opinions is no longer necessary to level the playing field."

Other commentators have already forcefully countered these arguments. Unpublished decisions rarely provide the thoroughness of research or analysis one hopes to find in a law review article. They are instead the product of necessary triage - as one observer wrote, "In easy, routine cases, appellate judges tend to see their role as merely checking for mistakes. They look to see that the lower court applied the right legal standards, and that no obvious injustice occurred." E. Lazarus, "The Proposed Change to the Federal Rules of Appellate Procedure Allowing Citation of Unpublished Opinions: Why It Will Be Harmful," FindLaw Legal Commentary (Nov. 27, 2003). Judges can carefully review the briefs and record in a case and then concisely explain who won, who lost, and why, in a few sentences or paragraphs, usually without elaboration of the facts, since the intended audience (the parties and their lawyers) already know the facts. *Lyons v. Labor Relations Comm'n,* 476 N.E.2d 243, 246 n.7 (Mass. App. 1985).

The rule would also hardly eliminate nonuniformity in any meaningful way. Most states have a noncitation rule, at least for some of their courts, *see* M. Serfass & J. Cranford, "Federal and State Court Rules Governing Publication and Citation of Opinions," 3 J. App. Prac. & Process 251 (2001). It's been my experience that most lawyers practice in one state - so the uniformity that would most affect them is a uniformity of practice between the federal and state courts where they work -- something this new rule would not touch. In my last job, at the Department of Justice, I worked with some of the finest appellate lawyers in the country. Yet even these lawyers -- who literally flew around the country from circuit to circuit never encountered any hardship in checking the rules of each court they appeared before, particularly since the predominant practice of courts is to include a footnote or header on unpublished opinions pointing to the relevant local rule.

And it is likely that judges will change their current behavior of providing some explanation (in all but a few cases), if faced with the prospect of seeing cursory or somewhat less than precise reasoning quoted back at them. *See, e.g.,* R.

Posner, "20 Questions for Circuit Judge Richard A. Posner" at http://20q-appellate.blogspot.com/ (Dec. 1, 2003) (current practice of providing reasons for unpublished decisions might end if reasons "could come back to haunt us").

Effect on Tax Court

Where I can perhaps help the Committee see some unintended consequences of the Rule is from my perspective on a court of specialized, but national, jurisdiction: Tax Court judges are unusual in being both "producers" and "consumers" of unpublished decisions.

As "Consumers"

The Rule's intended target is unpublished appellate opinions. This would directly affect my Court's work of applying federal tax laws uniformly across the nation. Because appeals from our decisions go to every circuit court except the Federal Circuit, we very early on had to respond when appeals resulted in divergent views between the circuits, or between our Court and a circuit, on the right answer to a particular tax question. We concluded that we should continue to apply our own construction of the law until Congress changed it, the Supreme Court ruled on the matter, or the Court as a whole voted to reverse itself.

But there is one exception to this general practice -- "We reasoned that, where a reversal would appear inevitable, due to the clearly established position of the Court of Appeals to which an appeal would lie, our obligation as a national court does not require a futile and wasteful insistence on our view." *Lardas v. Comm'r,* 99 T.C. 490, 494 (1992). (This is called the *Golsen* rule among tax lawyers, after the case where it was first pronounced, *Golsen v. Comm'r,* 54 T.C. 463 (1970).)

What then to do with a noncitable circuit court opinion? Our rule is currently a bright-line one: If a decision isn't citable in the court that issued it, we do not feel bound to follow it under the *Golsen* rule. *Ruegsegger v. Comm'r,* 68 T.C. 463, 467 (1977). Would this change if all decisions (including oral rulings from the bench, like the one that was analyzed in *Ruegsegger*) became citable? Who knows? The Note doesn't mention the complication. Even if the

distinguishing feature is an opinion's lack of precedential force, as the Note purports to guarantee, it is inevitably going to be the case that parties before the Tax Court will feel it necessary to sift through and argue about appellate opinions that were not intended by their authors to be given such scrutiny. And because memorandum dispositions, oral bench rulings, summary affirmances and the like are often not fully comprehensible without intimate knowledge of the record involved, I can easily foresee an escalation of litigation research into a close analysis of the briefs and other filings that gave rise to previously-noncitable appellate decisions. These are sometimes available, and sometimes not, on commercial databases. They are certainly not going to be plumbed by the 70 percent of our litigants who are *pro se*.

As "Producers"

One of the noteworthy aspects of the proposed Rule is its scope - it would make citable "judicial opinions, orders, judgments, or other written dispositions . . . ." The Rule on its face seems not to be limited to appellate dispositions, leading me to fear that it would render all the dispositions of trial courts -- including Tax Court -- citable as well.

It appears from the draft Note that the Committee did not recognize how broadly the proposed Rule might sweep. The Tax Court, for example, disposes of about 17,000 cases a year, at least 400 of which lead to opinions. As is true of appellate courts, we too have a hierarchy of citability and precedential status. At the top are *reviewed decisions*, voted on by all presidentially-appointed judges in conference. These are joined in our official reported decisions by *division decisions*, those which, in the opinion of the chief judge of the Court are of sufficient precedential value to warrant inclusion in our official reporter with the reviewed decisions. Both types are binding on individual judges in future cases until superseded by legislative change or overruled by the Court acting in conference. Together they make up 10% of our total opinions. Next in line are *memorandum decisions*, designated as not precedential by the chief judge, not published in our official reporter, but widely available in commercial databases and in hardcopy publications (making up about 80% or our total). The remainder are either *summary opinions* or *bench opinions*. Summary opinions are written in small tax cases, and by statute are neither appealable nor precedential. 26 U.S.C.

§ 7463. Since 2001, they have been available on our Court's website, but are not widely available in hardcopy, and by Tax Court Rule are not citable. Bench opinions are summary decisions -- made orally -- issued when the law is clear and the facts not that complex. Like all our workproduct, these are publicly available, but they do not appear on our website, nor are they commercially available, nor would they often be fully comprehensible to those outside their intended audience (*i.e.*, the parties and their counsel) who do not have the necessary familiarity with the record and arguments made in the case. Not even included in our statistics are *orders* -- which probably constitute the bulk of our reasoned decisionmaking, and whose public availability is the same as bench opinions.

Yet the current draft of the Rule would make all these various types of dispositions citable in appellate courts. How does this measure up against the reasons that the Note offers for the Rule?

- Thoroughness of reasoning -- Those opinions designated as noncitable by my Court are designated that way precisely because they lack the thoroughness in drafting or the benefit of discussion by all the judges acting in conference. Allowing them to become a source of persuasive authority to circuit courts, when they couldn't even be cited to us, seems odd.

- Hardship to practitioners -- The Rule would create a disuniformity in federal tax practice. Our rules would continue to prohibit citation, but now the appellate rules would allow it. To the extent that the Rule's advocates think that this is a weighty concern, this would seem to counsel against the Rule's adoption.

- Judicial resources -- Knowing that any of our opinions could be cited would likely have some effect on the allocation of judicial time and effort in my Court, just as it predictably would in appellate courts. Any increase in the time spent honing details of language and logic in routine cases now disposed of quickly and efficiently by summary and bench opinions, or by orders, would necessarily detract from the time and effort we can spend on reviewed and divisional opinions, lessening our ability to further the uniform development and adjudication of federal tax law.

- Ready availability -- Unlike unpublished appellate decisions, trial decisions will remain for the foreseeable future much less likely to be widely available. Maybe the IRS and specialized tax practitioners will develop their private databases, but our *pro se* litigants will be out of luck.

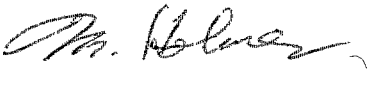
Conclusion

That rules of noncitability are so widespread in both federal and state courts strongly suggests that they are beneficial, perhaps -- like many rules and norms -- not always for reasons fully articulable to those who intuitively feel they make sense. My own explanation is that they reflect a common perception by many judges on many courts over the last four decades or so that litigants increasingly come to court with different goals in mind. Some, possibly most, still come to resolve sincerely held but different interpretations of the facts or law in particular cases. An increasing number, I think, use trial courts like my own to check the mistakes of administrative agencies, even if the law is not at issue and the record is not even compiled at a trial. And, sadly, at least in tax law, a substantial number come to court to delay and obfuscate.

The proposed Rule, viewed most favorably, would create only the smallest of gains in the correct disposition of cases of the first sort -- sincere disputes about the law and facts. It would probably reduce the ability of courts to efficiently dispose of cases of the second sort -- a speedy review to check for error or gross injustice by administrative agencies. And it would definitely create new opportunities for those trying to use the judicial system to delay the inevitable by imposing pointless costs on their opponents.

The Committee should reject it.

Sincerely,



Mark Holmes