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02/18/2004 01:27 PM

To: Rules_Comments@ao.uscourts.gov
cc:
Subject: FRAP Rule 32 -- comments in opposition

03-AP-492

Dear Mr. McCabe:

Attached in PDF are my comments in opposition to proposed Federal Rule of Appellate Procedure 32. I submit these comments as an individual only; they do
not necessarily reflect the views of my employer or my colleagues.

Very truly yours,
Diane Knox

(See attached file: FRAP 32 opposition.pdf)

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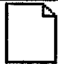

FRAP 32 opposition.pd

Diane Knox
251 West 92nd Street, 4E3
New York, New York 10025

February 17, 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, DC 20544

Dear Mr. McCabe:

I write in opposition to the proposed Federal Rule of Appellate Procedure 32. I have practiced law at a large New York firm since 1997, and this experience brings to light three significant disadvantages to the proposed rule.

Proposed rule 32 would likely force our judges to issue decisions whose analyses will kept secret even from the parties to the disputes before them. As a former judicial clerk I am aware of the complexity of preparing an opinion that sets out fully its bases in the facts, in precedent, and in reasoning. It seems clear that the workloads of our courts of appeals make it impossible for them to prepare fully articulated opinions concerning each dispute they consider. It is even more clear that not every dispute that makes its way to an appellate court is an appropriate vehicle for judicial precedent. The proposed rule would likely force responsible judges to summarily dispose of cases lacking precedential value in a mere handful of words, leaving litigants to wonder whether their cases received due consideration at all.

Unpublished opinions often fail to fully articulate the context of the dispute and its disposition, and may be easily misapplied. As an advocate I have developed an appreciation of the art of exploiting every nuance of favorable text in even the most minimal judicial opinions. The thinner the fabric supporting the words that may be useful to bolster an argument, the easier it is to apply favorable language to the dispute at hand, even if the court that issued the text contemplated nothing of the sort, and would never intentionally apply those analyses and ideas to such a situation. Lawyers have no more insight into the underpinnings of sketchy opinions than anyone else not involved in their drafting, and may have no idea that the fully articulated reasoning behind them would not support their arguments. Allowing the citation of the vast body of unpublished dispositions would be an invitation to their misuse.

Allowing citation of unpublished opinions favors litigants with big budgets. Significant inequities in briefing may arise when one side of a dispute can afford resources for research which are, practically speaking, unlimited, and the other is constrained in the usual ways by time and money. Many unpublished opinions are available on electronic databases, but such services are expensive. Other unpublished opinions may come to light only because a firm handles many cases relating to particular issues, and has collected these documents from its own cases and those of others with similar interests, or because someone has been paid to search courthouse files and read the papers. Prohibiting the citation of unpublished opinions would eliminate some of this inequity.

I strongly urge that proposed Federal Rule of Appellate Procedure 32 be abandoned.

Very truly yours,
Diane Knox

Please note that I express the opinions in this letter as an individual only; they do not necessarily reflect the views of my employer or my colleagues.