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February 24, 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 Federal Rule of Appellate Procedure 32.1

03-AP-504

Dear Mr. McCabe:

I am writing to oppose proposed Rule 32.1, which states that a court of appeals may not prohibit a party from citing an "unpublished" opinion and may not place any restrictions on the citation of an "unpublished" opinion unless those restrictions apply equally to "published" opinions. While I support the Committee's desire to create uniformity among the courts of appeals on the treatment of unpublished opinions, I do not believe proposed Rule 32.1 is the appropriate vehicle.

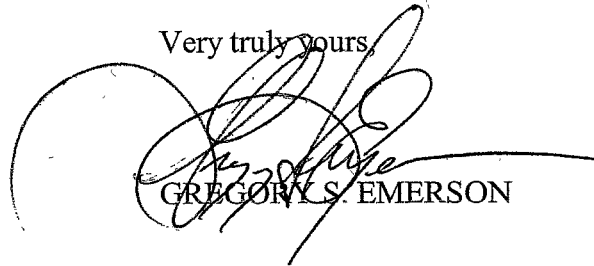
I support that portion of proposed Rule 32.1 which prevents the courts from prohibiting the citation of unpublished opinions. I also do not believe that attorneys should not be subject to sanctions or ethical misconduct charges for citing an unpublished opinion. However, I believe that proposed Rule 32.1 is overbroad. It should simply be limited to preventing the courts from prohibiting the citation of unpublished opinions or issuing sanctions, in any form, for citing to an unpublished opinion.

Proposed Rule 32.1, however, should not interfere with the courts' ability to place restrictions on the citation of unpublished opinions. Taking away the courts' right to impose different or additional restrictions on unpublished opinions would undermine the very reason for allowing courts to issue unpublished opinions in the first instance. Many decisions are unpublished because the facts of the case are unique, the appeal is routine and law is clear, or the legal issues do not have a broad impact beyond the parties to the case. Thus, the courts often do not consider the broad ramifications of such opinions and do not spend as much time drafting them. Allowing litigants to freely cite to such opinions has no value to the appellate process or the development of the law. As such, the courts should be allowed to impose restrictions that unpublished opinions may not be cited except in limited circumstances, such as relevance to a claim of preclusion, law of the case, sanctionable conduct, or for persuasive value where there is no published opinion on the issue.

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Although it is clear that litigants should be allowed to cite to unpublished opinions without fear of sanctions, the courts should be allowed to place restrictions on the citation of unpublished opinions. Accordingly, I urge the Committee to reconsider the adoption of proposed Rule 32.1.

Very truly yours,



GREGORY S. EMERSON

GSE/CRS:

cc: Colleen R. Smith, Esq.