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December 16, 2003

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

Re: Proposed F.R.A.P. 32.1

Dear Secretary McCabe:

I am writing today as a former federal court of appeals and Supreme Court law clerk, a frequent user of our federal appellate court system, and a great admirer of those courts, as well as the judges, law clerks and administrative staff who all work so hard to process our Nation's litigation. Specifically, I am writing to comment on proposed F.R.A.P. 32.1, which would preclude the individual courts of appeals from prohibiting or restricting the citation of "unpublished" opinions.

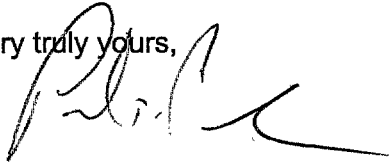
While the goal of allowing litigants to cite all judicial opinions is laudable in theory, I am afraid that, in practice, the proposed rule would do more harm than good. I, and many other general counsels of public companies, have previously indicated to Congress our concern over the tremendous workload faced by federal judges, and the concomitant need to raise judicial salaries. A similar concern regarding the workload of the federal appellate courts leads me to conclude that adopting proposed F.R.A.P. 32.1 would be a mistake.

In my view, in order for federal appellate judges realistically to have the opportunity to put in the effort that is required to decide carefully more complicated cases, and to support those cases with well-reasoned written opinions, it is necessary for them to retain the flexibility to decide some of the more simple cases without the need to produce a fully-polished written opinion fit for publication and citation as precedent. If judges know that their unpublished opinions will be cited as precedent, they will necessarily have to spend more time on the unpublished cases, making sure that the language is not overbroad or misleading. Alternatively, they may resort to judgment orders and one-line dispositions.

It is perhaps the case that some federal courts of appeals may be differently situated from others in terms of workload, and accordingly my recommendation would be for the Committee on Rules of Practice and Procedure to leave it up to the individual circuits whether or not to allow the citation of their unpublished opinions. I think that has worked well in the past in striking the right balance in different circumstances, and I would urge the Committee to retain that flexibility for particularly overburdened circuits.

Thank you very much for considering my views.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul T. Cappuccio", with a long horizontal flourish extending to the right.

Paul T. Cappuccio
Executive Vice President
and General Counsel