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Peter G. McCabe, Esq.
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

I understand that the Committee is considering amending the Federal Rules of Appellate Procedure by adding proposed Rule 32.1. Although I am in the state-courts vineyard, as a practical matter seeds of what the federal courts do often germinate in our soil. Accordingly, I would like to tell you why I believe that proposed Rule 32.1 is a bad idea. If implemented, it will waste valuable resources, and, moreover, it is not needed.

1. Most appellate courts, state and federal, are busy. We hear lots of appeals. Our court, like most if not all intermediate appellate courts, must hear *every* appeal that lands at our door. We do not have the luxury of "discretionary review," as does the United State Supreme Court and most of the state courts of last resort.

Our caseload is thus divided between: (a) cases presenting issues of law that are not new; and (b) those appeals requiring, to one degree or another, the crafting of new law. As with most intermediate appellate courts, including those in the federal system, the division is not equal; we get far far more of the first kind of appeal than of the second. What does this mean—for us and the parties? It means that we should not devote the same amount of energy, research, and invent-a-new-wheel analysis with the routine appeals that present variations on well-worn themes as we should on matters that are essentially of first impression. There are only 1,440 minutes in a day, and minutes spent on the routine appeals cannot be spent on the others, those that require significant analysis and research. My own practice is, I believe, fairly typical.

I personally draft opinions that are slated for publication. Decisions in routine matters where publication would not be appropriate are either issued as

"unauthored" *per curiam* opinions or "unauthored" summary orders. With a limited exception not material here, *per curiam* decisions cannot be published. Summary orders may never be published.

In my chambers, the *per curiam* decisions are drafted by my law clerk. In our district, the summary orders are drafted either by the court's central staff or by our law clerks. When I review the *per curiam* opinions drafted by my law clerk, the "summary orders," and the decisions written by my colleagues that are not recommended for publication, I am more tolerant than I would be if the opinion were headed for the books. Indeed, our publication committee routinely takes that into account when faced with a post-issuance request to publish from either the parties or others. Moreover, not infrequently, the briefing is so substandard that even though the panel may be confident in its rationale and result, the failure of vigorous adversarial analysis by the parties makes the decision a potential weak thread in the fabric of our jurisprudence. *See* ***Adamson v. California***, 332 U.S. 46, 59 (1946) (Frankfurter, J., concurring) ("Decisions of this Court do not have equal intrinsic authority. The *Twining* case shows the judicial process at its best—comprehensive briefs and powerful arguments on both sides, followed by long deliberation, resulting in an opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court."). Although ***Adamson*** and ***Twining*** were overruled by ***Malloy v. Hogan***, 378 U.S. 1 (1964), Justice Frankfurter's observation about the value of good briefs and careful judicial analysis is as true now as it was then. Permitting citation to the mass of opinions that are now "unpublished"—whether as binding precedent or "mere" persuasive authority—would, in my view, permit the bacterium of a sloppy sentence or inartfully addressed issue to infect the body of our law.

Just this week, for example, one of my colleagues dissented in an appeal that was drafted by my law clerk as a *per curiam* opinion because at our decision conference we agreed that the appeal presented issues that were neither new nor unique. Nevertheless, upon further reflection, one of my colleagues decided to dissent. In our court, a dissent means that the decision cannot be issued in a *per curiam* format. I re-wrote the decision (I write everything that goes out with my name on it as the author) to make it the type of case with which I would want my name associated as the author. I would not have wanted the *per curiam* opinion cited; although accurate and well-written, it was designed merely to explain to the parties why one side prevailed and the other side did not.

A rule that permitted citation of all opinions would, per force, require judges to give to *each* case the kind of letter-by-letter scrutiny we now give to only published opinions. This, in my view, would be a horrendous waste of resources and would inevitable lead to a dilution of quality with no, and this is

significant, concomitant benefit; just *how many* citable opinions do we *need* for the proposition that a police officer may arrest without a warrant a person whom he or she sees break a store's plate-glass window?

2. From a real-life standpoint, citation is not needed; the opinions are out there and accessible through free court-site access. Good lawyers will scan these electronically available opinions to help them write their briefs—both at the trial and appellate levels. And, at least in our court, every judge reads every "authored" opinion, irrespective of whether that opinion is recommended for publication, as well as the *per curiam* and summary orders that originate in his or her district.

3. One further point. I see that one of the reasons that the Committee Note gives for suggesting adoption of proposed Rule 32.1 is that this "will relieve" lawyers of the "hardships" of having "to pick through the conflicting no-citation rules of the circuits in which they practice" and the concomitant "worry about being sanctioned or accused of unethical conduct for improperly citing an 'unpublished' opinion."

First, this seems more like an arguing point than a reason. Good lawyers, *especially* those with national practices, will know the rules, and the rules against publication are far less onerous than those relating to word limitations and whether the word-processor word-counter is approved by a particular circuit. Second, and more significant, it ignores the fact that most lawyers' practices are limited geographically; more lawyers practice in both the state and federal courts in their own area than hop from circuit to circuit. For lawyers practicing in state and federal courts, proposed Rule 32.1 will add another, needless in my view, layer of complexity—the rules will be different depending upon which appellate courthouse in the lawyer's area he or she files.

Although I am not privy to its reasons, the Wisconsin Supreme Court, which writes the rules governing our state-court system, has so far resisted efforts to permit the citation of "unpublished" opinions issued by the Wisconsin Court of Appeals. I hope that after all the Sturm und Drang, this will be the result of the current effort to add proposed Rule 32.1.

Sincerely,

Ralph Adam Fine
Judge, Wisconsin Court of Appeals