03-AP-073

HARVEY SISKIND JACOBS LLP

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Lawrence J. Siskind

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

Re: Proposed FRAP 32.1

Dear Mr. McCabe:

I am writing to express to the Committee my strong opposition to proposed FRAP 32.1. I expect that you will receive many comments, pro and con, from judges and clerks. I offer my comments from the perspective of a practitioner.

A great deal of the activity which falls under the rubric "litigation" never actually reaches the courts. It is conducted in correspondence, telephone calls, and street corner arguments between opposing attorneys. Very often, we practitioners persuade one another to follow a course, or to refrain from following a course, on the basis of informal arguments. Needless to say, we harness all the resources we can in these endeavors.

I have frequently encountered stubborn attorneys who would not budge from a clearly erroneous course because they had managed to locate some unpublished decision on an electronic database. No matter how many contravening published decisions I might cite, this lesser form of weaponry often suffices to keep an attorney on his or her erring course.

Proposed FRAP 32.1 would exacerbate this tendency by lending an imprimatur of judicial authority. Attorneys will say that now that their right to cite these authorities is recognized, the authorities themselves must have force. The result will be greater difficulty in lawyers resolving matters on their own. Any energetic lawyer (or his legal assistant) given enough time on LEXIS or WESTLAW is likely to find some unpublished memorandum to support his position. Reducing the chances of attorney working out problems between themselves will mean that they will be forced to

turn to the courts more often for resolution, thus contributing to a still heavier workload for judges. (Ironically, this heavy workload is one of the main reasons that we have unpublished decisions to begin with.)

Some of the arguments cited in the Committee Note following proposed FRAP 32.1 strike me as unrealistic, and aloof from the realities of everyday practice. For example, the Committee Note states: "Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value." Then the Note lists such sources as law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. Believe me, when I am locked in debate with an obdurate opposing counsel, I do not try to move her by citing Shakespeare or an advertising jingle. Unpublished decisions are another thing. Many attorneys treat them as good currency.

The Committee Note goes on to say that proposed FRAP 32.1 will not lead judges to spend more time on unpublished decisions because it "does not require a court of appeals to treat its internal 'unpublished' opinions as binding precedent." But this misses my point. I am not concerned only with what courts of appeals might do. I am concerned with what my fellow practitioners are doing, and will do to an even greater extent, if the proposed rule is enacted.

For the sake of encouraging attorneys to resolve their differences outside of court, I urge the Committee to reject the proposed rule. I also thank the Committee for its consideration of my comments.

Sincerely,

Lawrence J. Siskind

LJS:tlb