15 January 2004

Mr. 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: Comments on Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe,

I write today in opposition to the proposed Federal Rule of Appellate Procedure 32.1. My opposition is based on the belief that permitting citation to unpublished precedent would serve only to lead, on the part of attorneys and judges alike, to the citation to and inappropriate reliance upon non-binding precedent that was never drafted in a manner intended to be relied upon in cases outside the issue at hand. Moreover, the rule does nothing to enhance the quality of representation for clients, but will merely add a mire of case law which must be waded through and evaluated, despite the intention of the judiciary that such cases never be utilized in this manner. The enactment of this proposed rule will not only have grave consequences for the more lofty and theoretical concerns of the operation of law in our courts, but will also have vastly pragmatic implications that will negatively impact the already strained daily operation of the courts.

Under the current system, courts are permitted to designate certain opinions as unpublished decisions, rather than a full published opinion. This recognizes the simple fact that every case that comes before the judiciary is not in the nature of a case that will amend, modify, update, or overrule established precedent. For the vast majority of cases, the decision of the judge is nothing more than an application of given precedent to a specified set of facts, lending nothing to the established precedent. The decisions written in these cases are not drafted in a manner intended to impact and influence future cases. These decisions are simply written to inform the parties to that specific litigation as to the process and basis for the judge's decision in that given situation. It should be no surprise to anyone involved with our court system, that law clerks or staff attorneys are responsible for the drafting of the vast majority of these decisions and are done comparatively quickly. The bottom line is that the endless care and attention that is placed into drafting and revising opinions determined to impact precedent and thereby requiring publication is simply absent in the cases designated as unpublished decisions.

As litigators, we are students of words. In evaluating cases, we study and analyze the turn of every phrase, and do our best to utilize and maneuver with such in the best interests of our clients. When cited as precedent in legal memoranda submitted to the courts, the judge to which the citation is presented also applies an equally stringent assessment in reaching his decision. Published opinions are drafted by the judiciary with the knowledge that their opinions will be subjected to this intense scrutiny. Supporters of FRAP 32.1 assert that if unpublished decisions are referenced in legal briefs, judges will be able to afford the appropriate weight due to these unpublished opinions in reaching a decision. This suggestion is non-responsive. By citing to an unpublished opinion, an attorney has placed a judge on notice that another judge, perhaps of a higher court of the same jurisdiction, has come down in a particular fashion on a given set of facts. While not binding precedent, to suggest that the impact and suggestiveness of this knowledge will have no effect on that judge's decision is nonsensical. The obvious result is that this judge has now been influenced by a decision in a case that the original drafter never intended anyone to rely upon as precedent for future cases in its drafting. The sad truth is that if one searches diligently enough, it is nearly always possible to find at least one unpublished decision on point or supportive of your adversarial position on a particular issue, regardless of whether the decision is a fair representation of the state of the law in a given jurisdiction. To be permitted to present such citation as authority of any influence to a court cannot but impermissibly influence the outcome of a decision, even if improper and contrary to the current rule of law. This can only lead to anomalous results between courts of the same jurisdiction.

None of this is to say that attorneys are not free to copiously utilize these unpublished decisions. Foremost, when conducting research, unpublished decisions are often excellent background sources of research that lead attorneys on to the heart of the body of law that actually controls in a particular jurisdiction. When an unpublished decision is found that is factually similar, the outcome of that case certainly provides the involved attorneys with guidance as to likely outcomes in their pending cases. Moreover, in these situations there is nothing to say that theories, phrases, descriptions, and methodologies cannot all be taken from these cases and utilized in the process of developing one's own case. The bottom line, however, is that they simply should not be cited to as authority of any sort. To suggest that a citation to a judge's decision, even if not of precedential value, on an issue has no impact or influence on another judge is to ignore human nature.

It must also be recognized that permitting citation to these unpublished decisions will have an effect on the legal profession as a whole and potentially slow down the already overburdened court system. First, permitting citation to unpublished decisions will immediately impose an ethical obligation upon practicing attorneys to begin carefully researching and scrutinizing unpublished decisions for bits of favorable language upon which to rely and suggest to judges as appropriate outcomes in future litigation. If this becomes an available body of

law for citation, it must be researched and assessed in order for attorneys to meet their ethical obligation to competently and zealously represent clients. This immediately puts at a disadvantage lower-income clients, pro se litigants, solo practitioners and small-firm attorneys. The time and cost of research will immediately increase. The time required to wade through these unpublished decisions will immediately raise the costs of representation. Moreover, access to the technology required in order to retrieve unpublished decisions adds to the cost of doing business. At a minimum, internet access is typically required. More often, access to expensive legal search engines is the only method by which these decisions can at all be easily perused and sorted. Second, the additional time required for such research will not only add hours and in turn dollars to the legal bill, but add hours to the processing time of cases. Not only will attorneys require additional time to prepare briefs, but legal clerks and judges will also require additional time in order to resolve legal conflicts as they too must now search the entire database of both published and unpublished cases. This further adds to the cost of business, at the expense of those who perhaps most need access to the courts.

Second, the ability to cite to unpublished decisions will cause the judiciary to re-think their methods of doing business. These changes will likely occur in one of two fashions. One such evolution might be that judges no longer issue lengthy opinions in resolving matters not designated for publication, but instead simply annotate the result on paper. This certainly is not the optimal solution for the immediate parties to the lawsuit. It is an unusual litigant at best who does not desire to read and understand the thought process and analysis that went into the judge's determination of their case. Moreover, with each issued decision, reviewing attorneys receive a certain level of professional development, not to mention familiarizing themselves with how particular judges resolve certain questions of law and fact – information useful to all practitioners in that area of law. The other possible evolution is that greater scrutiny will go into the drafting of all decisions prior to being released. The outcome of this option can only be the unbearable deceleration of a system that is already overburdened and backlogged, simply dragging the process out for an even lengthier period of time. Again, we must ask ourselves as officers of the court, whom these delays in the court system injure the most.

The simple solution to this problem is to drop the proposed FRAP 32.1. Continue to permit the separate districts or jurisdictions to decide for themselves whether citation to such authority, or non-authority as it were, is appropriate in their respective areas of responsibility. However, if it is a uniform rule that is desired by the Committee and the drafters, then the only outcome that will help maintain the efficiency and efficacy of the court systems would be a proposal to prohibit citation to such unpublished decisions. We trust our judiciary to make fair, impartial, and informed decisions. There is no reason why they cannot be trusted to determine which cases impact established precedent and are therefore

ripe for publication, and those that add little to the current body of law and do not require publication.

Thank you for taking the time to consider my thoughts and comments on this matter. I trust these issues will be undertaken very seriously when the time for decisions to be made is at hand.

Very Respectfully,

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