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03-AP-246

January 26, 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: Opposition to FRAP 32.1

Dear Mr. McCabe:

I write in opposition to proposed FRAP 32.1 which would provide that a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value. The Advisory Committee notes various pros and cons to this proposed rule, largely dismissing significant cons, including concerns that the proposed rule would unfairly impact those who represent poor litigants. It also promotes the rule as important to those who practice in multiple jurisdictions. My practice is entirely focused on federally charged defendants who cannot afford to retain counsel, and is currently in multiple jurisdictions – and I find myself in complete disagreement with the Committee's reasoning. In addition, for very practical reasons, this kind of rule should be left to the individual circuits, as it is each circuit that knows the weight to be given its own unpublished opinions.

I have served as the Director of two separate Federal Defender offices, Federal Defenders of San Diego, Inc. (1983-1991) and Federal Defenders of Eastern Washington & Idaho (1992-2002), and have been a public defender in the federal courts for all but approximately one year of my 26 years of practice. Until recently, the vast majority of my practice was in the Ninth Circuit where the rule is that "unpublished" dispositions cannot be cited. However, I am currently one of two full-time Capital Resource Counsel for the Federal Public and Community Defenders, and in that capacity work in multiple jurisdictions with lawyers representing clients charged with capital crimes in federal court. Since taking on this new role some 18 months ago, I have entered appearances as appointed counsel in cases in five separate federal jurisdictions (all different circuits); I also consult with lawyers practicing all over the country.

Initially I gained experience with the publication practices of other circuits during the almost ten years I authored the "Guideline Grapevine", a monthly summary of the decisions of all circuits on the Federal Sentencing Guidelines. This monthly newsletter

was primarily an aid to CJA panel attorneys and federal defenders who were facing these new and often complicated sentencing rules. Because there was very little "law" or guidance to practitioners in the beginning of the Guidelines we included unpublished opinions, but fairly quickly abandoned inclusion of those opinions primarily because of the lack of analysis, and what appeared on the surface to be misleading reasoning, which we could only conclude was the result of the lack of factual development in those cases.

The Committee's concern that the current rule adversely affects lawyers who practice in multiple jurisdictions does not override the understanding that the various circuits have of the value of their own unpublished dispositions. The quality of unpublished dispositions is vastly disparate, ranging from those that set forth an apparently well reasoned result (whether I agreed with it or not) to those that appeared to reach results contrary to the published circuit law, and those that appeared particularly poorly reasoned primarily because they do not include sufficient facts to know whether the result is fair or not. Citation of potentially misleading case law is burdensome in itself, as eventually that will cause litigants, at least those with time and resources, to seek out greater information about those cases in order to clarify the aberrational result. Alternatively, we will encourage those circuits whose judges know the infirmities of these unpublished decisions, to simply issue "affirmed" or "reversed" orders, depriving the parties (who know the facts of their cases) of any understanding of why they won or lost. Lawyers who practice in multiple jurisdictions already face the study of varying local rules and practices making it frivolous to rely on the "making it easier on the lawyers" argument. If consistency is the goal, the better rule would be to prohibit reliance on unpublished opinions.

The Committee's quick dismissal of the burden of this proposed rule on poor litigants is unwise and unfair. To say that the availability of internet research services solves the problem of access is to deny the reality of a legal practice that typically involves a large volume of cases and clients. While many defender offices and CJA lawyers have inexpensive access to Westlaw, Lexis or other case law research services, the lawyers more often than not have a high volume practice where there is precious little time to spend perusing the significant published opinions on a topic, much less the unpublished dispositions. The proposed rule seems a bonus to the United States Attorneys offices and other Department of Justice lawyers who can find support from literally hundreds of lawyers who focus on appellate practice, and have the luxury of time to parse through unpublished dispositions. And, there remain those solo criminal defense practitioners and legal services lawyers who practice with little support, cannot afford to subscribe to Westlaw or Lexis, and who handle primarily appointed cases and other legal services for poor litigants. I recall not that many years ago fielding a call from a lawyer who practiced in a small town in the northeast who called to ask me to mail him a copy

of an opinion he read in the "Guideline Grapevine", since he did not have access to "the books." I initially thought he was referring to the Guideline Sentencing Manual itself, when in fact he was talking about the Federal Reporter.

While a national rule on citation of unpublished opinions has some surface appeal, it will adversely affect poor litigants whose lawyers often have to manage a high volume practice and who already struggle to meet the superior resources of the government. In addition, only the individual circuits truly understand the value of their own unpublished dispositions and should have control over whether or not to permit citation.

Thank you for the opportunity to comment.

Sincerely,

Judy Clarke