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03-AP-298

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, DC 20544

January 30, 2004

Re: Proposed FRAP 32.1

Dear Mr. McCabe:

I am writing to express my opposition to proposed Federal Rule of Appellate Procedure 32.1.

As a former clerk on the United States Court of Appeals for the Ninth Circuit, I saw first-hand the enormous number of published opinions generated by this single circuit. Permitting citation to unpublished opinions would have the affect of expanding *five-fold* the number of opinions attorneys would be required to read and analyze in preparing their briefs. This is because once it became permissible to cite unpublished decisions, attorneys would be negligent in not doing so. The result would be an explosion in the cost of appellate litigation.

At the same time, FRAP 32.1 would require the circuit courts to dramatically increase the amount of time and resources devoted to each case. Even if unpublished decisions continued to lack precedential value under the proposed rule, clerks and judges would feel obligated to review all the cases cited in a brief. Thus, the number of prior decisions that would need to be considered would expand exponentially. Moreover, the possibility of seeing "unpublished decisions" cited in future briefs would tend to cause judges and their clerks to devote to every case, even routine cases posing no new questions of law, much more time and effort than would be practicable. The result, absent a huge increase in the number of federal judges, would be a dramatic slowing of the judicial process.

Finally, the argument that disparate local appellate rules on unpublished decisions are unduly burdensome to practitioners is unsupportable. With modern technology it is easy for a practitioner to quickly check the local rules in every circuit with minimal effort and

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expense. Certainly, the idea that there are "too many different rules" has never been considered a strong reason for eliminating rules that are otherwise well-justified.

I urge the Committee on Rules and Practices to reject proposed FRAP 32.1.

Sincerely,



Charles E. Cohen
Assistant Professor of Law