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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

By Fax: (202) 502-1755

Re: Proposed Revision to FRAP 32.1

To the Committee:

I am writing to oppose the adoption of proposed FRAP Rule 32.1, which, if adopted, will allow parties to cite unpublished decisions, purportedly for its perceived persuasive value. I am the research and writing specialist for the Office of the Federal Public Defender for the District of Hawaii. Previously, I was an appellate attorney for the state public defender's office, and, prior to that, I clerked for Justice Steven Levinson of the Hawaii Supreme Court for two years. These experiences are the basis for my comments.

As I understand it, one of the principal reasons for allowing citation to unpublished decisions is because conflicting rules in the various federal circuits -- some permitting, some not permitting, citation to unpublished decisions -- have created a "hardship" for practitioners. The hardship is that practitioners must know in which circuits he or she may cite unpublished decisions, or risk -- if he or she cites such a decision -- being sanctioned in a circuit that does not allow it. This supposed hardship, however, pales in comparison to the much greater burden that proposed Rule 32.1 would foist upon practitioners, especially non-government practitioners, such as CJA panel attorneys in criminal cases.

This Committee has noted that nearly eighty-percent of decisions are unpublished. If adopted, Rule 32.1 will therefore require attorneys to review four hundred percent more case law. Some, if not much, of this case law will not be readily available. Even if circuits are required to post unpublished decisions on their respective web sites, these listings are not, at least presently, searchable with any degree of reliability or ease. Combing through a five-fold increase of decisional case law is, under these circumstances, certainly more onerous than having to be aware of thirteen different circuit rules regarding citation to unpublished decisions. And, obviously, where counsel is court appointed, costs will increase to reimburse attorneys for their time in researching and analyzing

unpublished decisions. Proposed Rule 32.1 will create hardship to both practitioners and the judiciary, not alleviate it.

Nor is the need to permit citation to unpublished decisions at all apparent to me. In my experience -- both as an appellate clerk and as a practitioner -- unpublished decisions do not announce new principles of law or otherwise expand upon the law in any fashion. Rather, a court issues an unpublished decision in part because the principles it relies upon to resolve a particular case are well established, and the application of those principles to the facts under review consists of unremarkable analysis. In all of the years I have spent conducting legal research, I have never discovered an unpublished decision that significantly, much less persuasively, augmented, elaborated, or otherwise expanded the principles articulated in a controlling published decision. Hence, allowing citation to unpublished decisions will not provide attorneys with any additional authority -- persuasive or precedential -- in support of their legal arguments. In other words, unpublished decisions have little, if any, persuasive value. As such, citation to such decisions is both unnecessary and unwise.

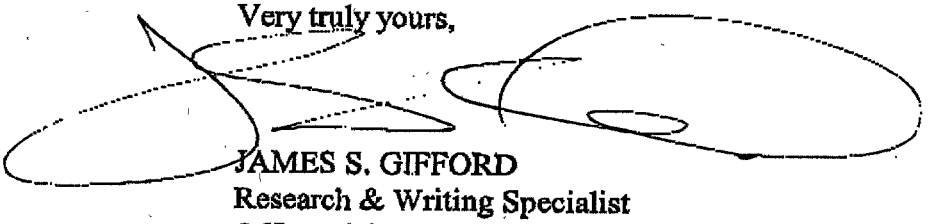
Rather, allowing citation to unpublished decisions will, in all likelihood, result in one of two things. Either courts will spend more time on each decision or courts will spend less. If the former, justice is delayed, as litigants will need to wait longer for a decision in their case, and, moreover, appellate dockets will soon face an overwhelming backlog. If the latter, courts can be expected to simply issue an order indicating that it either affirms, vacates, or reverses the lower court judgment, without providing any analysis or discussion of why. This frustrates litigants and attorneys alike, who are left to wonder why and how the court reached its decision. Presently, courts provide at least some analysis and citation to case law in unpublished decisions -- albeit often minimal -- explaining how and why it reached the result it did. Ultimately, if the backlash to proposed Rule 32.1 is the cessation of articulating any analysis in unpublished decisions, litigants will be frustrated with, and potentially loose respect for and confidence in, our courts.

Nor does proposed Rule 32.1 further the administration of justice by expanding the sources of insight and information that can be brought to the attention of a court and, thereby, purportedly promoting transparency of the judicial system. Unpublished decisions, being little more than rote application of settled principles to unremarkable factual situations, are not insightful. Indeed, the unpublished decisions I have written, as a clerk, and read, as a practitioner, routinely do not set forth enough factual information to determine whether it is or is not "on point" or, for that matter, persuasive in other contexts. Moreover, as noted above, if the backlash to the rule is the reduction of unpublished decisions to little more than a word -- for example, "Affirmed" or "Reversed" -- then the rule will have resulted in less, not more, transparency in the system.

Whatever problems are perceived to plague unpublished decisions, I do not believe that a rule permitting citation to such decisions will solve those problems -- instead, it will, in all likelihood, exacerbate them.

I urge you to not adopt proposed FRAP Rule 32.1.

Very truly yours,



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