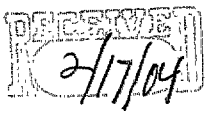

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03-AP-421

February 16, 2004

BY FACSIMILE (202) 502-1755

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 Proposed FRAP 32.1

Dear Mr. McCabe:

I write in opposition to proposed Federal Rule of Appellate Procedure 32.1.[1] My opposition to the proposed rule is primarily twofold. First, I believe the committee should, in the interests of "judicial federalism," defer to the individual circuits to determine what type of publication system best suits their docket. Second, from a practitioner's point of view, the time and expense to research and review this new pool of prior "non-precedential" and as yet unwritten decisions would be an unnecessary burden and cost to our clients.

The Federal Rules of Appellate Procedure provide a solid framework for practice within each of the circuit courts of appeal, however, each circuit has to varying extents promulgated their own local rules and operating procedures that they have determined will allow for the most expeditious handling of their docket. Whether these relate to the format of briefs, oral argument, or simply filing requirements, they have been crafted to suit each circuits particular situation. Where certain circuits have decided to allow for the citation of unpublished opinions, or conversely to prohibit the citation of non-precedential decisions, this choice should be left to the individual circuits. The rationale for adopting a uniform rule with regard to the citation of opinions in order to avoid attorney confusion, should pale in comparison to the judgment of judges the circuit itself, that the ability to issue non-precedential opinions is in the best interests of judicial efficiency and consistency in the state of the law of the individual circuit.

If the Committee truly wishes to alleviate the burden on lawyers who practice in more than one circuit (or even more than one district), it would be better served in working to

[1] The opinions expressed herein are my own, and not necessarily those of Blank Rome, LLP.

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standardize the myriad of local rules relating to filing requirements, brief length, form of submission, and other administrative requirements of the courts.

Similarly, the ever increasing volume of litigation, combined with the expanded power of electronic legal research, more often than not presents practitioners with the problem of how to wade through too many potentially relevant cases, rather than not enough. The addition of thousands of additional opinions, which the circuits would otherwise deem "non-precedential," will only add to the costs of legal research and brief writing as parties are forced to spend time reading and distinguishing additional cases. Moreover, the sudden addition of thousands of currently non-precedential/unpublished decisions – never meant to be cited – will only add unnecessary confusion to the state of the law in their originating circuit. The imposition of this additional burden, cost, and confusion to the established law of a circuit are not warranted by the arguments put forth in favor of FRAP 32.1, and the proposed rule should be rejected.

Finally, as a former law clerk at the U.S. Court of Federal Claims, I would urge that another factor weighing against the adoption of FRAP 32.1 should be the additional burden the proposed rule will place on judges and law clerks. For the reasons outlined above, the Committee should defer to the individual circuits to decide for themselves whether or not their opinions should or should not be citable. Moreover, to remove a circuit's ability to issue non-precedential decisions without providing a sufficient increase in funding to hire the additional law clerks and staff necessary to handle the additional work required, (and potentially additional circuit court judges themselves), merely creates another unfounded mandate to the circuits and their current judges.

For these reasons, as well as others, I believe the Committee should reject the adoption of proposed FRAP 32.1.

Very truly yours,

Craig L. Hymowitz