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BY FIRST CLASS MAIL

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: Proposed FRAP 32.1

Dear Mr. McCabe:

I am writing to urge the Advisory Committee on Appellate Rules not to adopt as final proposed FRAP 32.1. As you know, this proposed rule would establish a uniform, national requirement permitting the citation of "unpublished" opinions. In my view, this proposal would do far more harm than good. I should note, of course, that I am speaking on my own behalf, and not on behalf of my Firm.

I have practiced law for over twenty years (both in government and out), and have been admitted to practice before the United States Courts of Appeals for the Fourth, Ninth, and District of Columbia Circuits. I understand the frustration many of my fellow practitioners feel at not being able to cite unpublished opinions on brief. However, in my experience at least, it does seem that the more dubious the proposition advocated the more likely it will find support only in a court's unpublished decisions, and not in the body of its published precedent. Moreover, the case simply has not been made for the imposition of a national rule.

Two justifications have been advanced for proposed FRAP 32.1. First, it is suggested that the current system, where each Circuit adopts its own rule on this issue, creates a "hardship for practitioners, especially those who practice in more than one circuit." This point is, well, less than convincing. Surely, it is no more trouble to check the local rule governing the citation of unpublished opinions than it is to discover the name of the Court's Clerk, and its address, for use on the cover letter. Perhaps more to the point, every practitioner is supposed to become familiar with the local rules of any court in which he or she is admitted to practice. If the Committee's logic on this point is correct, then all local rules should be eliminated, since all local distinctions "burden" the Bar in exactly the same way.

Second, the Committee suggests "that restrictions on the citation of 'unpublished' or 'non-precedential' opinions are wrong as a policy matter." The reasoning here is that a vast array of materials can already be cited to the courts as "persuasive" authority and, hence, there is no reason to exclude unpublished opinions. There is, however, a difference. When the opinions, even the unpublished ones, of another court are cited, the underlying argument is as follows: the other court accepted or advanced a particular reasoning and, therefore, this court should too – it can, and should, trust the other court's judgment. When an unpublished opinion of the same court is cited, however, the underlying argument is invariably a precedential one, in the most basic sense: this court accepted or advanced a particular reasoning in another case and, therefore, it would be fundamentally unfair not to apply that same rationale in the instant case. Such opinions *are* cited for their precedential value.

That being the case, there is little doubt that the adoption of proposed FRAP 32.1 would require Circuits that currently do not permit the citation of unpublished opinions to reconsider how such opinions are prepared and issued. To the extent that already overburdened courts will have now to consider how unpublished opinions may shape the law of their Circuit, the result is likely to be more summary dispositions. This will be bad for clients, bad for lawyers, and bad for the justice system as a whole.

It is no secret that unpublished opinions do not receive the same level of care as published ones, and generally are issued in cases considered to be of lesser importance. These decisions are, nevertheless, highly important in the context of those cases. Most clients care very much why they won or lost – especially why they lost. (I have found this to be equally true of individuals and highly sophisticated corporate clients.) In the absence of a written opinion, lawyers must speculate, and such speculation is never very satisfying. A written opinion however, even one that has not been issued for "publication," goes a very long way towards reconciling the client to the result in a case, and demonstrating to them that their cause at least got some serious consideration.

Of course, not all Circuits have the same workload, and reaction to the revised rule will likely differ depending on the individual Circuit's circumstances. Obviously, some Circuits already have moved to adopt a more lenient rule regarding the citation of unpublished decisions (including the D.C. Circuit), and only time will tell whether the fears expressed above will prove correct. This would seem, however, to favor the current system, where Circuits are permitted to adopt their own rules on this subject.

Overall, the current system has worked. It does not burden practitioners, and it

accommodates the different circumstances of differing Circuits. I urge the Committee to leave the current rule, which has served the public well, in place. Unnecessary change is, after all, improvident change.

Sincerely,

Lee A. Casey