

2/9/04
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03-AP-299

BY FACSIMILE 202/502-1755 AND BY US MAIL

Peter G. McCabe, Secretary
 Committee on Rules of Practice and Procedure
 Administrative Offices of the US Courts
 One Columbus Circle, NE
 Washington, DC 20544

RE: Proposed Rule of Appellate Procedure (FRAP) 32.1

Dear Mr. McCabe:

I write to share my personal opposition to proposed Federal Rule of Appellate Procedure 32.1, which would permit citation of opinions that are designated as unpublished and non-precedential by the issuing courts. I believe that the proposed FRAP would result in a negative impact on the federal courts, leading to either a loss of efficiencies and/or the potential for fewer opinions with meaningful explanation. For clarity, I submit that, despite the distinction addressed between "citable" and specific precedential value, that may be a distinction without a difference for practical applications. If lawyers are able to cite decisions/dispositions, then they would no doubt do so - for example, to support a position (seeking precedential application, whether confused or not), to cover one's bases as broadly as possible, and/or for fear of a malpractice claim for failing to pursue such an avenue.

Unpublished and non-precedential dispositions are important as they provide for the efficient and orderly administration of justice in a busy court system. Writing an opinion to be certified for publication – and that will serve as precedent in that circuit and for analysis for other circuits and for further appellate review and application – requires extensive review, research, and analysis. Published opinions already require drafts, reviews, and revisions before being finalized, a process that can require months of effort. An unpublished, non-precedential opinion or ruling yields an important result for the participants – a decision on the matter – but does not require the additional effort and likely delay that published opinions do and will require. The unpublished opinion provides a succinct outcome, addressing who won and why – but without the detailed analysis (perhaps like that required in a law review article) that could delay issuing the opinion and providing clarity and closure.

If unpublished and non-precedential dispositions are to be citable as precedent, then the (already heavy) workloads facing the federal judiciary will grow, likely leading to greater inefficiencies in the system and/or leaving judges with little choice (or time) but to issue short (perhaps one or two word) rulings without any explanations.

It seems appropriate to permit judges in individual courts and circuits, in their individual and collective experience and wisdom, to determine which cases will have precedential value – and which ones can be decided without attaching such weight.

Very truly yours,

Kevin A. Cranman
 Member of the Georgia Bar

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