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December 1, 2003

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 write to comment on Proposed FRAP 32.1. I believe it is a bad mistake. I write from the perspective of a trial lawyer who has practiced in the federal district courts and courts of appeal for almost thirty years. For three years, I served as Co-Chair of the ABA Committee on Corporate Counsel of the Section of Litigation. I want to make it clear that I do not write on behalf of my firm, the Committee or of the ABA, but I can tell you that based on my conversations with several inside and outside counsel, they share my views of the proposed rule.

As an initial matter, I believe that we have far too much "law" as it is and as a partner in a Los Angles law firm of approximately 130 lawyers I am well aware of the complaints of clients of the enormously high cost of legal research. Proposed Rule 32.1 will do little to clarify the more than substantial body of law that already exists but it will have the following deleterious consequences (among others). What small benefits the proposed rule might have would be overwhelmed by the following:

First, it will make legal research more burdensome and costly to clients who will have to pay for more lawyers to research more cases, most of which will have little value to the issues in dispute.

Second, lawyers and courts will be forced to rely upon ambiguous and potentially misleading dispositions.

Third, disposition of certain cases will likely be delayed given the much larger body of law that will have to be reviewed and analyzed by the courts of appeal. Many judges will pay greater attention to the precise wording used in opinions resolving routine cases. The increased attention will not alter the disposition of these cases, which have already been resolved unanimously by judicial panels, but it will greatly delay their resolution. The circuits are already overburdened and the proposed rule will simply increase the burden as judges will be required to devote more time in crafting the dispositions for routine cases.

Fourth, while the proposed rule will delay some cases because it will take longer for the courts to consider a much larger body of cases cited to them, it is likely to produce the opposite effect, which is equally unpalatable. If the proposed rule were adopted, judges in many other cases will likely avoid explaining their decision to the litigants, as they now do in dispositions that are not citable, and will likely resolve many cases by summary disposition. Thus, instead of getting unpublished dispositions which explain to the parties the rationale of the court, the parties will in a large number of cases likely be denied even a brief explanation of the rationale underlying the court's decision.

Fifth, the Advisory Committee's suggestion that the new rule is "extremely limited" misunderstands my perspective and the perspective of many practitioners. If unpublished dispositions *can* be cited, they will be and lawyers will inevitably treat them as a significant source of authority. To ignore relevant opinions is to invite claims of professional negligence.

Sixth, district courts, bankruptcy courts, and agencies within the same circuit will likely treat all published dispositions of the courts of appeals as controlling in a way that citations to law reviews and the like will never be. The reality is that lower courts will be extremely reluctant to ignore what three judges of the Court of Appeals appear to have done.

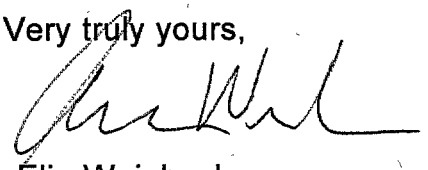
Seventh, there is no need for uniformity here. Local practice and rules are sufficient and it is easy enough to figure out what can and cannot be cited. The unpublished disposition provides that information.

For these and other reasons, I strongly urge that the proposed rule not be adopted. If you should need any further comment, please do not hesitate to contact me.

MITCHELL SILBERBERG & KNUPP LLP

Peter G. McCabe, Secretary
December 1, 2003

Very truly yours,



Elia Weinbach

EW:sdm