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January 26, 2004

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 give a practitioner's perspective on proposed FRAP 32.1, which I oppose.

I am a partner at Bartlit Beck Herman Palenchar & Scott. I have been litigating cases for eight years, in both state and federal trial courts and courts of appeal. Our firm is dedicated not only to excellence but also to efficiency in the practice of law. For example, we think the billable hour leads to inefficiency and increased costs. It rewards those who take longer to do something, promotes make-work, and drives up the cost of litigation. Our firm advocates billing arrangements that reward lawyers based on results, where the quality of work matters more than the quantity.

I believe that the proposed rule will only make litigation more inefficient. It will result in a huge increase in the quantity of legal work, but a decline in the quality of legal argument and decrease in legal certainty.

If lawyers are permitted to cite unpublished opinions, they will do so. They will do so regardless of whether a Circuit has said that those opinions will be given any (or much) precedential weight.

The rule will dramatically increase — in some circuits by a factor of five — the volume of case law that must be searched, reviewed, and cited. This will only be good for law firms who seek to bill more hours, because teams of associates will spend hours scouring all the unpublished opinions for the legal needle in a haystack — a scrap of reasoning, a comment, a factual situation that they (or their opponents) might cite.

The proposed rule will not be good for those paying the bills, those seeking to reduce legal costs, or those seeking resolve legal disputes more efficiently and quickly. It will make it more difficult for lawyers to determine, or to advise their client, what the law is.

The citation of unpublished opinions will not promote better legal analysis or argument, or increase the certainty of the law. To the contrary.

In almost every case the citation of unpublished cases will add little or nothing to the substantive explanation of the law. I know from my practice, as well as from the year I spent clerking for a federal Court of Appeals judge, that the unpublished opinions are used in easy cases, applying settled law rather than developing or elucidating the law. They are written quickly, sometimes by clerks, and discuss only enough of the facts or circumstances of the case to let the parties know the basis of the court's decision. Unlike published opinions, the language in unpublished opinions is not pored over with an eye to guiding future courts and litigants.

While they may contain enough discussion to fully explain the court's reasoning to the parties, already familiar with the facts and history of the case, unpublished opinions do not provide the full story for future litigants or courts. As a result, both the results and the language of unpublished opinions are prone to be misunderstood, misapplied, or taken out of context.

Allowing the citation of unpublished opinions may well lower the level of substantive analysis in memoranda and briefs. Briefs addressing a handful of published opinions on a topic can address the merits, reasoning, and factual circumstances of those cases in depth. A brief dealing with five times as many unpublished opinions can be little more than a series of sound bites, lacking context or explication.

Of course this assumes that the Courts of Appeal will continue to write unpublished opinions. In fact it is likely that judges will change their current practice in response to the enactment of the proposed rule.

First, judges might take more time writing and rewriting unpublished opinions. Apart from the problem this poses for already overworked judges, it will be bad for litigants. It will increase the already-lengthy delay, stretching further the time (and expense) it takes to resolve a case in federal court, and making the courts less available for those with legitimate disputes but limited resources.

Second, judges may write fewer or no unpublished opinions. Where they do not want their reasoning cited in future cases, they will offer no reasoning. That, too, will be bad for litigants. Parties turn to the Courts not just to see who wins and who loses, but to understand why. For litigants to have faith in the courts, they must see that decisions are reasoned and principled. This is especially true for the losing litigant. A single word decision is unsatisfying to the parties, and undermines confidence in the justice system.

I know that these concerns are more pertinent in some circuits than in others, as circuits face different caseloads and different circumstances. For that reason the treatment of unpublished decisions should be left to each circuit to determine. A uniform rule — and particularly one requiring the circuits to permit citation of unpublished opinions, is a bad idea. I respectfully ask the committee not to adopt proposed FRAP 32.1

Sincerely,

Mark Ouweleen

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