FEDERAL
DEFENDERS
OF
SAN DIEGO,
INC.

The Federal Community
Defender Organization
for the Southern
District of California

January 28, 2004

03-AP-279

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20455

Dear Mr. McCabe:

I write to express my opposition to proposed Federal Rule of Appellate Procedure 32.1. I oppose the proposed Rule for three reasons: (1) I believe that adoption of a rule permitting citation of unpublished authority will be detrimental to the federal court system as a whole; (2) it will unduly burden both judges and lawyers alike and (3) it will further disenfranchise several groups of litigants, specifically, *pro se* plaintiffs and indigent criminal defendants.

First proposed FRAP 32.1 would be detrimental to the federal court system. The proposed Rule allowing for citation of unpublished opinions indicates that "most agree that an 'unpublished' opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court)" but it "says nothing about what effect a court must give to one of its 'unpublished' opinions or to the 'unpublished' opinions of another court." The proposed rule in essence leaves the decision whether the "unpublished" opinion could be considered binding authority, persuasive authority or no authority at all "open," apparently as an exercise of judicial discretion. This makes for an unworkable legal standard. An important hallmark of our current federal law is a uniform, hierarchical system under which federal courts' published decisions are accorded a certain measure of authority depending upon what court issued the opinion and what court is applying the decision. Under the proposed rule, different judges may accord different weight to the same unpublished decision. Will the Court of Appeals reviewing the district court's decision give different weight to the same unpublished decision, requiring reversal of the district court's decision?

For litigants' sake and for the sake of preserving legitimacy in and the public's belief in the legitimacy of the federal judicial system, its legal analysis requires consistency. The proposed rule detracts from the present orderly system of applying the law and fosters inconsistent applications of law. This will adversely impact a legal system founded upon principles of *stare decisis*, precedent and an ordered system of weighting legal opinions. It will also result in adverse public opinion regarding our legal system.

The Committee Note to proposed FRAP 32.1 indicates that citation to unpublished decisions should be permitted because after all, litigants can cite Shakespearian sonnets and advertising jingles. There is a material difference between those citations and a citation to an unpublished opinion – no judge will feel compelled to apply Shakespeare's reasoning to his or her case nor will a judge be concerned that if he does not apply the result dictated in an advertising jingle, he may be reversed on appeal. Here, allowing citation but leaving the weight to be accorded to unpublished decisions to be determined on some unspecified *ad hoc*

Home Savings Tower
225 Broadway
Suite 900
San Diego,
California
92101-5008
(619) 234-8467
FAX (619) 687-2666

FEDERAL DEFENDERS OF SAN DIEGO, INC.

The Federal Community Defender Organization for the Southern District of California

Home Savings Tower
225 Broadway
Suite 900
San Diego,
California
92101-5008
(619) 234-8467
FAX (619) 687-2666

basis will, as a practical matter, result in judges and lawyers treating them as precedent in a manner unintended by the proposed rule.[1]

The second reason I oppose proposed FRAP 32.1 is because it will create more work for lawyers and judges. I am a longtime federal practitioner, having been a district court law clerk, a trial lawyer at the Department of Justice and a Federal Defender over the course of my career. I have had an extensive appellate practice and I have been the recipient of more than my share of unpublished decisions, both victories and losses. These decisions almost never recite all the relevant case authorities relied upon, they almost never recite all the facts relevant to the legal determination, and they rarely set forth the complete legal analysis required to reach the result. In short, they provide guidance to no one save the parties in the particular case who possess all the information which was not included in the decisions.[2]

Thus, allowing citation to unpublished authorities will not only fail to provide guidance in applying the law, but it will actually create confusion in applying the law. Because these unpublished decisions, for the sake of time and expediency, do not set forth all the particulars in the same way a published decision does, district courts and other panels of courts of appeals will be confronted with a slew of unpublished decisions which are undecipherable or ambiguous standing alone. Will judges be forced to order the appellate briefs and supply the missing information themselves? Will practitioners be forced to do so? The confusion in terms of what cases really control legal issues will be terrible. Moreover, the time judges and practitioners will have to spend collecting, applying, analogizing or distinguishing the large body of unpublished decisions will be substantial. Judges themselves may take more time to decide cases because they feel that every opinion they issue must be of "publishable" quality because of the undefined weight which other judges may give it.

Third, there are certain groups of litigants whose interests I wish to address. I am aware that indigent criminal defendants and *pro se* plaintiff litigants are not the most popular parties in our federal court systems, and indeed, most of them are probably unaware of this proposed rule and will never comment upon it. Nevertheless, I believe it will negatively impact them and that their plight should be considered seriously by the Committee. Indigent criminal defendants and *pro se* plaintiff litigants, as well as a number of sole practitioners, do not have access to electronic research, which is virtually the only way to search and sort unpublished dispositions. Incarcerated individuals do not have internet access at all.[3] These groups of

---

[1] After all, allowing citation but not commenting upon the precedential value to be accorded to the "unpublished" opinion is inimical to the entire process of citation to authorities – citing an authority means it is supposed to be authoritative. Do not get me wrong, I am not espousing allowing citation to unpublished decisions as precedent which I generally consider to be incomplete in terms of factual recitation and legal analysis.

[2] This is one reason that unpublished opinions may appear inconsistent with published opinions at times.

[3] Federal prisoners have no internet access. I do not know if State prison facilities allow it but I doubt that they do.

FEDERAL DEFENDERS OF SAN DIEGO, INC.

The Federal Community Defender Organization for the Southern District of California

Home Savings Tower
225 Broadway
Suite 900
San Diego,
California
92101-5008
(619) 234-8467
FAX (619) 687-2666

individuals will be materially disadvantaged in litigation because they will not be able to find favorable rebut or unfavorable unpublished authorities. Since this is a group of individuals who are already handicapped in the federal court system, proposed FRAP 32.1 will erect yet another obstacle for them to overcome.[4]

I strongly oppose proposed FRAP 32.1 for all of the above reasons. Thank you for considering my comments.

Sincerely,

SHEREEN J. CHARLICK
Supervisory Attorney

[4] The proposed rule's requirement that an unpublished opinion be served upon the opposing party unless it is available in a "publicly accessible electronic database" will also be a source of confusion and difficulty. Incarcerated litigants will not have the resources to obtain, let alone serve, these unpublished opinions and they may risk a court striking their pleadings for noncompliance.