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03-AP-109

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Objections to Proposed FRAP 32.1

Dear Secretary McCabe:

It is rare (as in never) that a proposed appellate rule change drags me away from the handcuffs of the billable hour. However, proposed FRAP 32.1 seems like such a bad idea that I could not in good conscience sit idly without sharing my concerns.

It hardly needs repeating that appellate decisions are the backbone of our system of judicial dispute resolution. Indeed, it has happened more than a few times in my litigation career that well-reasoned and well-supported judicial opinions, in the absence of contrary precedent, have led to the resolution of disputes before they ever reached the litigation stage (i.e., fairness and efficiency converged as a result of the law being clearly explained). Conversely, I think every litigator will attest to the absolute chaos that can be created when the law is not only "unsettled," but buoyed by poorly-reasoned or inadequately-supported pronouncements. It provides fodder for argumentative attorneys, which translates into extensive motion practice, expensive legal maneuvering, and delays in resolutions.

By making every judicial opinion published and citable, proposed FRAP 32.1 would only add to the chaos. I foresee the following harmful effects of such a rule:

a) Since the federal courts, particularly in the Ninth Circuit, already have serious workload problems, forcing all decisions to be published would result in either a hailstorm of short, sparse, insufficiently drafted "precedent" (more fodder with which to further clog the trial courts), or a proliferation of one-word judicial decisions ("affirmed" or "reversed"). Neither outcome is very satisfactory. The latter is particularly disheartening to clients who have spent tens or hundreds of

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thousands of dollars and many years to take a matter to the Circuit Court and need more than a single word to feel that justice has been done. Where a sparsely written opinion may not provide much value to the development of "the law," such an opinion does provide individual litigants with a sense that their disputes have been carefully considered and justly decided.

b) Because our appellate court justices, by and large, set very high standards for themselves (as they should in light of the importance of the work they do), and they understand that published opinions have consequences that reach far beyond the individual participants before them, they will spend more time working on their opinions, even those opinions that do not add to the advancement of the law or raise issues of significance to the bar. More time means more delay. And more delay not only frustrates those turning to the courts for redress, but threatens the integrity of our judicial system. It was not without some truth that William Gladstone once wrote: "Justice delayed is justice denied." Indeed, U.S. Attorney General Robert F. Kennedy extended the sentiment: "Justice delayed is democracy denied."

c) It may be that some Circuits have the time and resources to satisfy proposed FRAP 32.1. They should be allowed to adopt it. However, what may work for one Circuit will not necessarily work for all. Indeed, I would be very surprised if any Justice in the Ninth Circuit supported this proposal. I see no downside to local determination on this one. This is particularly true in California where the current Ninth Circuit rule mirrors the California rule; whereas proposed FRAP 32.1 would add a new layer of complexity for those great majority of California litigators who practice in both courts.

I close by noting that Chief Justice Warren Burger once issued a challenge to all of us:

> "Ideas, ideals and great conceptions are vital to a system of justice, but it must have more than that – there must be delivery and execution. Concepts of justice must have hands and feet or they remain sterile abstractions. The hands and feet we need are efficient means and methods to carry out justice in every case in the shortest possible time and at the lowest possible cost. This is the challenge to every lawyer and judge in America."

Proposed FRAP 32.1 would tend to bind rather than release those hands and feet.

Respectfully,

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p.s. These are my personal opinions, not those of the Weston Benshoof firm; however, I am certain my opinions are shared by many, if not all, of my colleagues.