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03-AP-197

January 20, 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:

As a practitioner of 20 plus years and an observer and occasional critic of the legal system, I wish to express my opposition to the proposed procedural rule that would require all courts of appeals to allow the citation of "unpublished" opinions. Because of the high volume of cases, both the Ninth Circuit and the California appellate courts have a practice of distinguishing between "published" decisions that are cite-able as precedent, and "unpublished" decisions that are not. This practice is sound, for the reasons expressed very articulately by Edward Lazarus in a FindLaw article dated November 27, 2003. See http://writ.news.findlaw.com/lazarus/20031127.html.

I will not repeat points he made there, except to emphasize the importance of (1) consistency and (2) manageable volume in appellate caselaw. Without both of these, the caselaw becomes incoherent and, therefore, useless as precedent. Courts distinguish between "published" and "unpublished" decisions for good reasons – to limit the volume of cite-able cases to manageable levels and to make sure that the decisions that do get published are written with care and are consistent with applicable precedent.

Imposing a "one size fits all" rule of requiring all decisions to be cited would create an unworkable "Tower of Babel" in large circuits such as the Ninth Circuit.

I urge you to reject this proposed rule.

Sincerely,

Mark S. Pulliam

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