

Paul, Hastings, Janofsky & Walker LLP
515 South Flower Street, 25th Floor, Los Angeles, CA 90071-2228
telephone 213-683-6000 / facsimile 213-627-0705 / internet www.paulhastings.com

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(213) 683-6319
allatham@paulhastings.com

February 3, 2004

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VIA FACSIMILE (202) 502-1755

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure

Re: Proposed FRAP 32.1

Dear Mr. McCabe:

I write in opposition to proposed FRAP 32.1. In my view, requiring the circuits to allow citation to unpublished decisions would be a serious disservice to the administration of justice.

I am a partner at Paul, Hastings, Janofsky & Walker LLP, a law firm with over 900 lawyers in fourteen offices worldwide. I practice extensively before both federal and state appellate courts, specializing in employment law. The views expressed herein are my own, of course, and not necessarily those of my law firm.

My concerns about the proposed FRAP 32.1 are as follows:

1. The rule would cause substantial delays in case processing, as the appellate courts would have to scrutinize every turn of phrase in every decision, in order to anticipate how it might be used or cited in other cases.
2. Far from encouraging greater openness, the rule would encourage the circuits to "clam up" and issue tight-lipped summary dispositions.
3. The reality being that staff largely prepare unpublished dispositions, their choice of wording should not be afforded precedential value (which, inevitably, is what FRAP 32.1 would lead to).
4. At a minimum, each circuit should be free to set its own rule in this regard, taking into account the circuit's particular circumstances and local practices.

I would particularly like to amplify the first point above. From 1983 through 1985, I was Chief Counsel to a Member of the National Labor Relations Board. The NLRB does not

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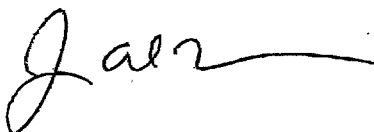
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have a no-citation rule as to any of the decisions it issues. The result, which I observed firsthand, was that the Board Members and their staffs were constantly having to scrutinize every word in every decision. They were constantly dropping footnotes and adding side comments such as "We find it unnecessary to pass on such-and-so", and "We disagree with the administrative law judge's statement that such-and-such" - all of which was completely unnecessary to the disposition of the case at hand.

Largely as a consequence of this, there was (and remains) a huge backlog of cases at the NLRB. In my view, a no-citation rule would allow the Board to process its cases much more expeditiously, thus contributing to the prompt administration of justice. The circuits should not be forced to add to the delays that are already occasioned by their overloaded dockets.

Thank you for your consideration of these comments in opposition to proposed FRAP 32.1.

Very truly yours,



J. Al Latham, Jr.

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