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VIA FEDEX

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:

Months ago I recall seeing vague references to a proposal to amend the FRAP by adding a new Rule, i.e., 32.1. On reading, some weeks ago, Judge Richard Posner's critically negative comments in How Appealing, I was determined to look at the issue in greater detail. I have an active, primarily Federal practice, a practice that started in 1972 when I became an Assistant United States Attorney for the Northern District of California. Although I would consider my practice to be primarily business litigation, I certainly have a fair amount of experience in briefing and arguing federal and state appeals.

Certainly when Judge Posner is highly critical of a procedural change, it bears looking into. I have finally taken the opportunity to review the material I have gathered together over the past few months. On reflection, the proposal is not a bad idea, it is a very bad idea. That I should, on my occasional forays into the appellate world, have to search through thousands of unpublished opinions, probably written by overworked law clerks for judges with the caseload of a Ninth Circuit Judge, makes no sense whatsoever.

I should note that I have been on the other side of this issue in a manner of speaking. Years ago, I argued what was for me my then most important argument in the Ninth Circuit involving the consolidated appeals of three related and very significant federal prosecutions. The convictions were affirmed in a not for publication opinion. My feelings were hurt. However, that does not change my opinion on the underlying concept.

The somewhat far fetched and less than unconvincing nature of the argument in favor of amending the rules is well demonstrated by the suggestion that appellate advocates are confused and have difficulty determining what rule applies in a particular circuit. Whether on my side or on that of the adverse party, it has been my experience that appellate advocates are, by and large, a pretty smart group and, unlike yours truly, can find virtually anything on their PC.

I practice primarily in the District Courts of California although I appear pro hac vice in district courts throughout the United States. In addition to California, I presently have active cases in U.S. District Courts in Boston and Phoenix. And you know something, I have enough sense to check not only the local rules but also the particular Judge's rules as well. It really isn't much of a burden. And to suggest otherwise is, if I might opine, an insult to the trial and appellate bar.

In researching the proposed amendment, I read an article both explaining and defending the Ninth Circuit rule, Rule 36-3, that precludes counsel from citing the so-called memdispos. In a somewhat unusual pairing, the article was co-authored by Judge Stephen Reinhardt and Judge Alex Kozinski. [See ***Please Don't Cite This,*** California Lawyer, June 2000]. When those two excellent albeit differing approach legal minds agree on something as controversial as the non-citation rule, one should take notice.

The statistics in this instance do not lie. Using the 1999 numbers referenced in the article, the Ninth Circuit in that year decided approximately 4500 cases on the merits, 700 by opinion and 3800 by memdispos. It is fairly obvious that the law clerks are primarily responsible for the drafting and finalizing the memdispos. This makes perfect sense since they do not set a precedent and are intended to explain the panel's reasoning to the litigants without the fine tuning required in crafting a published opinion or dissent. In sum, there is no way in the world that a judge on the Ninth Circuit could devote the time to a hundred or more memdispos that he or she does to drafting or reviewing an opinion, dissent or concurrence when precedent is at issue. As Judges Reinhardt and Kozinski point out, since the average judge authors about twenty opinions a year, it "is like writing a law review article every two and a half weeks." In the common lingo, the memdispos are simply not precedent setting cases.

These figures seem to be on the rise. I note that Ms. Pamela MacLean in her February 6, 2004 article in the San Francisco Daily Journal, "The Fight To Cite" reports that 800, or 16%, of the <u>now</u> 5000 decisions issued yearly by the Ninth Circuit are published opinions.

In that same article, Boalt Hall law professor Stephen Barnett suggests that "compelling considerations of judicial integrity, constitutional rights and public policy" support the rule change. Is Professor Barnett next going to suggest that enforcing a time deadline on when a brief or, for that matter, when a Notice of Appeal must be filed, raises a First Amendment issue?

I have also read in a later edition of How Appealing an argument submitted by Prof. Patrick Schiltz, St. Thomas School of Law, the Committee's Recording Secretary and an apparent supporter of the amendment, that the critics have it wrong. He argues that even with the Rule change, an appellate judge does not have to follow the memdispos but can take it or leave it like an overcooked vegetable on your dinner plate. I understand his statement to correctly state the effect of the amendment. The nature of the proposed revision necessitates that option. Unfortunately for the proponent, this is but one more reason to disregard the arguments of the advocates for change. Using the Ninth Circuit 5000 opinion figure as an example, it seems to me that the availability of 4200 take it or leave it memdispos, likely written by law clerks, for citation is but an invitation to mischief; mischief that will surely do harm to the appellate process.

I need add a personal observation. I understand that the Professor's comments are not the same as a Judge or Juror voicing an opinion on a matter under consideration before the evidence is in, but isn't it a bit unseemly for a member of the Committee on Rules of Practice & Procedure to be voicing an opinion on the proposed rule in a Blog, criticizing the opponents of the proposed change, and encouraging supporters of the change to write the Committee?

It is fair to assume that Fred Bernstein has sufficient experience based on his clerkship for a Circuit Judge to recite in his article ***How To Write It Right*** that a judge may go through 70 to 80 drafts over a period of months to make sure that he or she gets it right. I find repugnant the suggestion in the Advisory Committee Note that a judge need not spend additional time on a memdispos that might later be cited and kind of *laissez faire* let the lawyers do with it what they please. That appears to be a rather haphazard approach to appellate advocacy and decision making.

Let me add another point: I have the advantage being assisted in my practice by young and very computer literate attorneys. I am still very adept at researching using old fashioned methods and tools. I would suspect that there are a number of attorneys out there or, for that matter, attorneys representing economically less secure litigants than most who simply do not have the means or computer skills to engage in a search for a truffle in the cosmos where memdispos might be found.

In my opinion, the non citation rule should apply to all the circuits. However, and I won't get an argument here, I practice in an unusual circuit both because of its size, diversity of opinion and per judge caseload. At the very least, let the Judges of the Ninth Circuit determine how they want to deal with this issue. There is an ever increasing body of law out there, there is simply no need to unnecessarily increase that universe. The burden of proof is on those who want to make this radical change. Respectfully, let me suggest they haven't even come close to sustaining that burden.

Very truly yours,

Lawrence A. Callaghan

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