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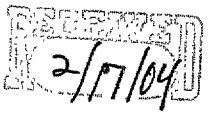

03-AP-423

February 9, 2004

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: Proposed F.R.A.P. 32.1

Dear Mr. McCabe:

As a former staff attorney and now practitioner in the Ninth Circuit Court of Appeals, I write in opposition to your effort to promulgate a national rule regarding what is or is not binding legal authority in each circuit. This decision should be made by the decision-makers, and not the national rule-making body.

Certainly I agree that in a perfect judicial system, every case would be decided by a carefully crafted published and citable opinion. That perfect world, if it ever existed, has been overwhelmed by events. With the routine appeal of every criminal conviction, the compound appeal of that conviction and the sentence, and all collateral attacks, at taxpayers' expense, not to mention routine appeals in social security cases, immigration cases, and prisoner cases – the goal of a "perfect" judicial system fell apart. The sheer volume of appeals having little or no factual differentiation, little or no legal merit, and requiring little or no legal research, accounts for at least 50% of the federal court's caseload. It is only through the use of non-binding, "unpublished" decisions that the Court can keep up with its workload and so, get back to the litigants with a timely, short and reasoned written explanation of the result in each case.

If these "unpublished" memoranda are given precedential status, each of us will feel compelled to cite them all in briefs. Overworked and understaffed courts will respond to the resulting citation by affirming more cases without an opinion ("AWOP"). As of now, we are more or less free of this in the Ninth Circuit.

In addition, citing unpublished decisions would serve no purpose. As it stands now, unpublished decisions in the Ninth Circuit only cover issues that are easily resolvable by clearly established law. Citing a published decision will not provide law to attorneys or the parties that

is not already available elsewhere. What citing an unpublished decision will do is take away time and resources from cases that address new law and/or address unresolved issues in order to craft a more detailed decision or, and more likely, cause the judges to affirm with no opinion.

As a lawyer, I welcome the reasoned explanation, even if I cannot cite to it in another case. If you open this vast body of informative but non-citable authority to citation in briefs, they will be cited, and my clients will have to be billed for hours of additional research time. My opposition will repeat the process. Judges and their staffs will repeat the research time, and bench memos and the resulting decisions will be resplendent with string cites and distinguishing verbal ballet, adding to the din and confusion of the law of the circuit.

As Thomas Jefferson once said, "It is the trade of lawyers to question everything, yield nothing, and to talk by the hour." Accordingly, it should come as no surprise that delays will worsen.

Furthermore, the Ninth Circuit already issues about 700 citable opinions that form the law of this circuit. Each of these decisions involves three Judges and as many as 12 law clerks, numerous drafts and an enormous commitment of time and resources. On top of this, this Court issues nearly 4000 short, reasoned explanations of case by case results to the individuals involved though its use of memorandum dispositions -- non-citable decisions resolving individual cases. The parties to each of these cases have the right to ask that the decision be issued by opinion rather than by memorandum, and through the adoption of a recent local rule change, the parties may now cite memoranda to this Court as evidence of an intra-circuit conflict that demands resolution.

In short, I find it difficult if not impossible to understand how my clients or the legal profession will benefit from any of this. Most of my clients want to be heard and want an explanation of the court's conclusion. The Ninth Circuit already has established procedures to ensure that my clients are heard, even if the decision is made in an unpublished opinion. The Ninth Circuit also currently has a procedure where my clients receive an explanation of the court's decision. The proposed rule change will cause further delays and in all likelihood, will prevent my client' from receiving an explanation of the Court's decision. While the judicial system is not perfect, it is at least human enough to feel like you have been heard and your contentions considered. The proposed rule change will cause further delays and remove the human element of the process where the parties are at least made aware that their contentions have been considered, even if those contentions are rejected.

Please leave well enough alone. Let the circuits promulgate its own rule regarding the binding value of its own decisions.

Respectfully Submitted

Michael D. Thomas