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03-AP-446

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

SENT BY FACSIMILE

Re: Opposition to Proposed FRAP 32.1

Dear McCabe:

I am writing to voice my opposition to proposed, FRAP 32.1, which would permit citation of unpublished decisions. I am a trial attorney with the Federal Defenders of Eastern Washington and Idaho. I have also worked as a law clerk at the federal district court level and enjoyed the experience of accompanying my judge to sit by designation on the court of appeals. My experiences lead me to conclude that allowing citation of unpublished decisions would be unwise and unjust.

When I first learned of the proposed rule, it struck me as inappropriate to be changing the rules regarding the use of unpublished decisions. Courts such as the Ninth Circuit have developed a practice of issuing unpublished decisions and the nature of that practice has been premised upon the assumption that such decisions would not have any precedential weight - - either binding or persuasive. To now declare that a decision, initially written only for the specific parties in question, can carry greater authoritative weight than initially intended would result in an inappropriate interference with a jurisdiction's decisions about how to carefully craft and develop its case law. Unpublished decisions are outcome driven. Care may not be taken with respect to exact language or reasoning. Lawyers should not be able to argue that potentially misplaced terminology or reasoning has value that was never intended by referring to portions of prior unpublished decisions.

Allowing citation of unpublished decisions would result in a significant addition to the workloads of lawyers in jurisdictions that currently prohibit the practice. Already, I spend several hours a week reading new cases relevant to my practice. The thought of trying to stay abreast of unpublished decisions, in order to potentially use them in my appellate work, is daunting. The fact that unpublished decisions might not constitute binding authority would not

FEDERAL DEFENDERS OF EASTERN WASHINGTON AND IDAHO
LAW OFFICES

alleviate this burden. Knowing that my opposition may be developing analyses based upon unpublished decisions would compel me to do the same.

Finally, and most importantly, allowing for citation of unpublished decisions would create an additional barrier to justice for small practitioners and pro se litigants who do not have the ability or time to access unpublished decisions. While it may be easy for an institutional lawyer or one affiliated with a large firm to find helpful unpublished decisions by performing a quick search on Lexis or WestLaw, this is not true for everyone. Lexis and WestLaw are prohibitively expensive for most small practitioners and unrepresented persons. Outside of these databases, there is no easy way to access or analyze unpublished decisions.

The law in this country is extremely complex and difficult to access by lay persons. Changing the federal rules to allow the use of unpublished decisions would only exacerbate this problem. I urge the committee not to adopt the proposed rule change.

Sincerely,

Rebecca L. Pennell
Trial Attorney

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