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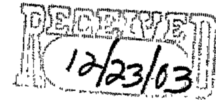

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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

December 10, 2003

Re: Proposed FRAP 32.1

Dear Mr. McCabe:

I write to urge the Committee not to adopt proposed FRAP 32.1, which would force circuit courts to allow the citation of unpublished decisions. I write in my capacity as an Acting Professor of Law at the UCLA School of Law, but also as a former clerk. Before teaching, I clerked for the Hon. M. Blane Michael of the 4th Circuit and the Hon. Alex Kozinski of the 9th Circuit. I also practiced law at Davis Polk & Wardwell in New York.

Several prominent commentators have come out against the proposed rule, and I agree with all that has been said against the rule. The constitutional argument in favor of the rule is unpersuasive at best, and numerous prudential reasons weigh against the proposed rule. As the committee reviews these comments to the proposed rule, it will find a telling pattern. The best writers in the legal academy and on the federal bench oppose the proposed rule, including Judge Posner, Judge Reinhardt, and Judge Kozinski. This is not a coincidence. By siphoning off precious judicial resources into the forced quasi-publication of "unpublished" decisions, FRAP 32.1 will make it harder for judges to write clear and persuasive "published" opinions, a task these judges rightfully see as the most important aspect of their difficult job.

I will focus my comments here on what I know best: my experience as a law clerk and my experience as a law teacher. My comments focus on two unfortunate aspects of the proposed rule: 1) the rule would detract from the quality of the written opinions of the federal appellate courts, 2) in so doing, the rule would harm legal education.

Impact on the Quality of the Opinions of the Federal Appellate Courts

After law school I clerked Judge Michael of the 4th Circuit (1996-97) and Judge Kozinski of the 9th Circuit (1997-98). The bar and academy recognize both judges as exceptionally fine writers, although of different styles. Judge Michael is a master story teller. His opinions make the complex stories of the law crisp, vivid and real; his opinions make the real world implications of a case abundantly clear. Judge Kozinski is a master of persuasion. His opinions use a delightfully direct, colloquial style. The reader feels like she is finally hearing what the law is really about, what is really at stake and

what the court is doing. One side or the other may disagree with the outcome, but at the end of a Kozinski decision there is never any doubt about what the Court did and why.

Exceptional writing takes time, however, and time is a valuable commodity. For published opinions, it was not unusual to do twenty or thirty drafts, sometimes more, as the first draft written in my voice slowly morphed into the judge's style. Hours would disappear as I entered changes from the judge or added my own, often rereading the changes aloud to make sure the opinion flowed. Perhaps 75% of my time as a clerk went to the drafting and editing of opinions. Yet this was never wasted time. The key difference between a published and unpublished opinion is that the published opinion is written primarily for the future; its precedential value is what warrants publication in the first place and all the attention that goes with it. Unpublished opinions, on the other hand, are written only for the parties in front of the court. As such, the opinions can be written quickly without fear of being misconstrued in the future.

FRAP 32.1 would inevitably hurt the quality of published written opinions. If every opinion becomes fair game for citation, more care must be given to the review of "unpublished" opinions. Regardless of the court's official position on the precedential value of unpublished opinions, if they may be cited, the bar will do so and will treat such cases as precedent. As a practical matter judges will have to spend additional care, time and attention they cannot afford to spare. It is a zero sum game, and even those in favor of FRAP 32.1 must acknowledge that the time will come away from the time devoted to published opinions. And if the quality of "published" opinions declines, even slightly, then the law becomes more muddled, more confusing, and (ironically) less accessible than before.

If FRAP 32.1 is adopted, then the best we can hope for is that judges will abandon the practice of writing unpublished decisions and instead publish one line decisions that indicate "AFFIRMED" or "REVERSED." Such a practice would be unfortunate, however, as the current practice of allowing unpublished opinions at least allows the judges to explain their decisions to the parties in a straightforward manner without worrying that non-parties will take the decision out of context.

Impact on Legal Education

Finally, allow me to shift gears and consider the rule in my current role as a law professor at UCLA. FRAP 32.1 will harm legal education in a small but significant way by eroding the quality of published written opinions. One of the joys of clerking was knowing that an especially significant or well written case would sometimes be included in a casebook, shaping the law in an indirect but powerful way by affecting the minds of new lawyers. By making it harder for judge to produce their best work, it will be harder for judges to help teach the next generation of lawyers, and harder for those of us in the academy to find good cases to teach with.

Sincerely,

Victor Fleischer
Acting Professor of Law
UCLA School of Law