03-AP-087



**KENAI PENINSULA BOROUGH**
144 N. BINKLEY • SOLDOTNA, ALASKA - 99669-7599
BUSINESS (907) 262-4441 FAX (907)262-1892

DALE BAGLEY
MAYOR

January 6, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
**via facsimile: 202-502-1755**

Re: Proposed FRAP 32.1

Dear Mr. McCabe,

I am writing to you to express my view that the FRAP should not be amended to permit citation to unpublished dispositions, and urge the Committee on Rules of Practice and Procedure to reject proposed FRAP 32.1.

As a former career law clerk for Judge Thomas G. Nelson, U.S. Court of Appeals for the Ninth Circuit, and former law clerk for Chief Judge B. Lynn Winmill, U.S. District Court for the District of Idaho, I have had a great deal of exposure to the realities of the process of judicial decision making, including the extremely heavy workload and time constraints that federal judges face. FRAP 32.1 will increase the workload and time constraints already faced by these judges, and will do so without sufficient justification.

The Committee states that the conflicting rules between the different circuits regarding the citation to unpublished dispositions "have created a hardship for practitioners." However, any hardship imposed on practitioners under the current rules is minimal. Access to the rules of each circuit is readily available online and there is nothing unduly burdensome about requiring a practitioner that chooses to practice in more than one circuit to be familiar with and comply with each circuit's rules, including each circuit's rule regarding citation to unpublished dispositions

Moreover, any burden placed on multi-circuit practitioners by the current rule is far outweighed by the increased burden that would be placed on federal judges, as well as practicing attorneys and their clients, by FRAP 32.1. Federal judges already see thousands of citations annually; FRAP 32.1 will likely quintuple the number of cases available for citation and thereby significantly increase the number of cases a judge must review in reaching her or his decision. FRAP 32.1 also will impose a significant burden on practicing attorneys, as they will be required to review the multitude of unpublished dispositions, in addition to the published opinions, in conducting their research and preparing their case.

The Committee asserts that it "is difficult to justify prohibiting or restricting the citation of 'unpublished' opinions," that there is "no compelling reason to treat 'unpublished' opinions differently," and that "it is difficult to justify a system that permits parties to bring to a court's

attention virtually every written or spoken word in existence *except* those contained in the court's own 'unpublished' opinions." Contrary to the Committee's assertions, there are strong justifications for treating unpublished dispositions differently than published opinions and other authorities.

In a perfect world, each decision issued by a judge, whether an unpublished disposition or a published opinion, would be well reasoned, thorough, and crafted in a manner to ensure that it has the proper precedential effect. However, the caseloads and time constraints faced by circuit judges makes such a "perfect world" impossible. Judges must, of necessity, allocate the majority of their limited time and energy on those relatively few cases that will make new law or are otherwise of unusual significance, and allocate less of their time to the greater number of "easy" or routine cases. The decisions issued in the cases reflect this time allocation: published opinions are generally issued in cases that either establish new law or are otherwise of significance; unpublished dispositions are generally issued in easy, routine cases and are intended only to provide the parties to that case with a minimal explanation as to the court's reasons for its ruling. The judges are able to provide a minimal explanation, as opposed to a full-blown analysis, in these routine cases precisely because the court's disposition is designated for non-publication and its precedential authority is thereby negated for future litigation involving outside parties.

FRAP 32.1 will force judges to spend more time drafting unpublished dispositions and thereby defeat the purpose behind having unpublished dispositions to start with. The Committee's response to this concern – that the rule does not require a court of appeals to treat its "unpublished" dispositions as binding precedent and does not require a court of appeals to increase the length or formality of its unpublished dispositions – falls short. The mere fact that an unpublished disposition may be cited to and relied on in subsequent cases, even if only as persuasive as opposed to binding authority, will force circuit judges to spend more time and care in drafting their unpublished dispositions. In light of the heavy workload and time constraints circuit judges already face, FRAP 32.1 will force these judges to reallocate their time. This reallocation may result in judges issuing summary dispositions, without stating any reason whatsoever for the decision; judges ruling from the bench immediately after oral argument; and/or judges spending less time drafting published opinions in cases that establish new law or are otherwise of significance and more time drafting unpublished dispositions in easy, routine cases.

For all of these reasons, I urge you to ensure that FRAP is not amended to permit citation to unpublished dispositions. Thank you for your time and consideration.

Sincerely,

Sheryl Musgrave

Sheryl Musgrove
Assistant Borough Attorney