Justice Richard C. Neal (Ret.)
1410 Hillcrest Avenue
Pasadena CA 91106

03-AP-126

January 4, 2004

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--OPPOSE

Dear Mr. McCabe:

I write in opposition to proposed Federal Rule of Appellate Practice 32.1.

I am a retired Justice of the California Court of Appeal, Second Appellate District, now practicing as an arbitrator and mediator.

I attach the text of my letter published several years ago in the Los Angeles Daily Journal explaining my reasons for opposing a similar rule proposed for the California State Courts. That rule was rejected by the California Legislature after full consideration.

I recognize that the proposed new federal rule wouldn't apply in the State Courts. But it would burden practitioners and judges in the same way, by vastly increasing the body of precedent they must address. Also, the same prospect of diminished opinion quality and increased influence of non-judge researchers and staff would attend the proposed federal rule. And, there is a significant chance the state courts would eventually follow the federal lead, and adopt new rules based on FRAP 32.1, as they done with other federal rules innovations.

Thank you for your consideration.

Very truly yours,

Richard C Neal

Richard C. Neal

Attachment

To the Editors of the Daily Journal:

Professor Barnett's piece on the proposal to make all appellate opinions precedent (April 13 Daily Journal) acknowledges the possibility that research would be costlier and more burdensome, but doesn't pause to analyze the issue. The Judicial Council's 1998 statistics show that courts of appeal statewide write about 13,000 opinions per year, of which about 7% (910) are published and thus precedential. In addition, the Supreme Court issues about 100 opinions per year, all precedential. So the present total annual output of precedential opinions is roughly 1,000. The proposal would increase this number to about 13,000 precedential decisions per year, a thirteenfold increase adding about 12,000 opinions to the annual growth of the body of California precedent. In ten years the body of precedent would grow by 120,000 cases instead of 10,000. This would substantially increase the burdens of research and analysis for lawyers and judges.

Nor could we expect an improvement in the quality of the body of precedent as the payoff for putting up with the greatly increased burden. Justices in the Second District author 12 to 16 opinions per month, and concur in an additional 24 to 32 opinions, a total monthly burden of 36 to 48 opinions. There is limited time to polish or reflect on the larger ramifications of the majority of a judge's own opinions, let alone those authored by other judges. The small percentage of opinions identified for publication get needed extra judicial attention because they will be precedent. On average they are better researched, reasoned and written than the unpublished opinions. (The Supreme Court, of course, publishes every opinion, but only after much greater opportunity for mature reflection and deliberation. The seven justices author on average only about one or two opinions per month, and concur in perhaps eight per month.)

Also, the great volume forces court of appeal justices to rely heavily on research attorneys to prepare unpublished opinions. Making all unpublished opinions precedential would increase the role of staff attorneys in making law--a trend Professor Barnett has elsewhere criticized (in his several pieces on the California Supreme Court).

I also question Professor Barnett's suggestion that it is contrary to fundamental Anglo American judicial principles for appellate courts to decide what cases should be precedent. The federal and state supreme courts, the primary sources of controlling case law, have long chosen what precedent to make. They select the cases and issues they will decide. The California Supreme Court picks from among 6,000 cases per year only 100 or so to address and decide in a published opinion. The courts of appeal simply follow this familiar pattern of selective precedent making when they pick cases to publish.

Richard C. Neal
(Associate Justice,
Second District Court of Appeal)