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03-AP-247

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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:

I previously served as a staff attorney, a criminal motions attorney and as the Senior Criminal Motions Attorney for the United States Court of Appeals for the Ninth Circuit. I currently specialize in postconviction litigation, and practice primarily in the United States Courts of Appeals, including the Ninth Circuit. I am a member of the Criminal Justice Act panels for three federal districts located in the state of California, and I am admitted to practice in the United States Courts of Appeals for the First, Fifth, Ninth, and Eleventh Circuits.

I strongly oppose the effort to promulgate a national rule regarding binding legal authority in each circuit. I believe it would be extremely ill-advised to require the Courts to issue only decisions that may be cited. The issuance of unpublished memoranda is valuable to both litigants and the federal courts.

The federal circuit courts currently handle a tremendous number of appeals, many of which do not present novel or significant legal issues, and many more of which are fact-bound. Published decisions in these appeals are not helpful to the development of a consistent and reasoned body of law.

Moreover, because the circuit courts handle such a large volume of cases, the requirement of producing a polished published decision in every case will wreak havoc on the courts' ability to remain current. At present, the volume of appeals having little factual differentiation, little or no legal merit, and requiring minimal legal research, accounts for at least 50% of the circuit courts' caseload. Non-binding, "unpublished" decisions permit the circuit courts to remain relatively current

with its workload and provide litigants with a timely, short and reasoned written explanation of the result in each case.

It is likely that overworked and understaffed courts will respond to the requirement of producing a published opinion in every case by affirming more cases without an opinion (AWOP). Such a development is not desirable: it can only materially increase the costs of appellate litigation, particularly in regard to the preparation of petitions for rehearing and rehearing en banc. The use of affirmance without an opinion leaves litigants unable to make rational decisions as to what, if any, arguments should be presented in a petition for rehearing. At the present time, this is not a problem that exists in the Ninth Circuit, where it is rare to have a decision affirmed without opinion. As a lawyer, I welcome the reasoned explanation, even if I cannot cite to it.

Additionally, if "unpublished" memoranda are given precedential status, counsel will be compelled to cite them in briefs. 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. Such an increase will place a burden both on private litigants and on the Criminal Justice Act fund, in the case of litigants represented by appointed counsel. The funds available for compensation of appointed counsel already are limited. Moreover, my opposition, usually the Office of the United States Attorney, will repeat the process, further increasing the cost to the federal government. Judges and their staffs will repeat the research time, and bench memoranda and the resulting decisions will be resplendent with string cites and microscopic distinctions.

Neither litigants nor the courts will benefit from the proposed rule change. At best, the rule will benefit only a small number of litigants, who have identified unpublished decisions they would like to cite. The cost to everyone else involved is enormous. Each circuit should be permitted to adopt rules suitable for its own circumstances.

Very truly yours,

Karen L. Landau