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03-AP-276

January 29, 2004

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:

As a former staff attorney and now practitioner in Ninth Circuit Court of Appeals, I write in opposition to your effort to promulgate a national rule regarding what is or is not citable legal authority in each circuit.

I agree that in a perfect world, every case would be decided by a carefully-crafted published and citable opinion. That perfect world has never existed and never will. The sheer volume of appeals having little or no factual differentiation, little or no legal merit, and requiring little or no legal research, accounts for at least 50% of the federal court's caseload. It is only through the use of non-binding, "unpublished" decisions that the court can possible keep up with its workload and get back to the litigants with a timely, short and reasoned written explanation of the result in each case.

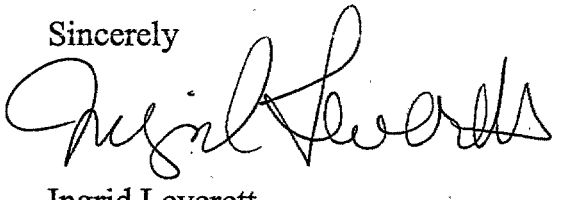
If these "unpublished" memoranda are given precedential status, each of us will feel compelled to read and analyze each and every one of these numerous, currently-non-binding opinions to determine whether and how to cite or distinguish them in briefs. I know well, from my experience as a staff attorney, that overworked and understaffed courts will have no option but to respond to the resulting citation by affirming most or all formerly-unpublished cases without an opinion (AWOP). In my view, AWOP opinions do a disservice to the litigants in those cases, who are deprived of any basis for understanding why the appellant's contentions were rejected and who, as a result, have an even lower chance than usual to have a petition for certiorari granted. As of now, we are more or less free of this problem in the Ninth Circuit.

As a lawyer, I welcome the reasoned explanation, even if I can't cite to it in another case. 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. My opposition will repeat the process. Judges and their staffs will duplicate the research time, and benchmemos and the resulting decisions will be much longer than they are now, resplendent with ad nauseum discussion of all relevant cases. The result will be an exponential increase in citable authority, all of it needlessly lengthy and confusing. Delays will worsen.

In the end, my clients will be harmed by this rule change. The hugely increased cost of litigation will reduce their access to legal redress. Moreover, the confusion and uncertainty of the circuit's law will eliminate any chance I may have of predicting a result for them. As a result, many will settle meritorious cases simply to avoid dealing with an outrageously expensive and unpredictable legal system. Those who brave that system will live with anxiety for many years, from the inception of a case through completion of the appeal.

Please leave well enough alone. Let the circuits sort this issue out for themselves.

Sincerely



Ingrid Leverett

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