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February 12, 2004

VIA FACSIMILE AND OVERNIGHT MAIL

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: Commentary on Proposed Rule Change (FRAP 32.1)**

Dear Mr. McCabe:

I recently read about the Advisory Committee's proposal (FRAP 32.1) to effectively override the Ninth Circuit's rule relating to unpublished dispositions, Circuit Rule 36-3. As a former law clerk, who served on the Ninth Circuit, I am intimately familiar with the unrelenting workload that the clerks and judges on the Circuit face. I now practice in the Circuit and rely on its decisions to frame the advice that I offer to my clients. As such, I have a vested interest in the efficient publication of consistent and clear legal rules by the Circuit. As I discuss in more detail below, elevating the circuit's unpublished dispositions to the status of citable precedent (whether *de jure* or *de facto*) will result in a massive drain on the Circuit's resources, substantial and unwarranted delay of Circuit decisions and confusion in the Circuit's precedents.

After reviewing FRAP 32.1 and the supporting commentary, it seemed to me that the drafters were wholly out of step with the practical reality of daily life in our Circuit. The Ninth Circuit decides over 4,500 cases a year. During my tenure in 1999, we heard approximately 450 cases on three-judge panels and took writing responsibility in over one-third of those cases. Putting aside time spent reviewing the written work of other chambers on the three-judge panels, assessing the merits of en banc calls, traveling to and participating in en banc panels, it is absurd to think that four law clerks and a judge could pound out a dozen opinions per month.

But that is precisely what FRAP 32.1 will require if adopted. Forcing the Circuit to allow citation of these dispositions will cause confusion in the lower courts and among litigants as to whether such dispositions carry the weight of an opinion. The meticulous judges of our Circuit will naturally pour more resources into these cases as a result, making them look more like opinions. This, in turn, will cause further confusion as to status of such dispositions, worsening the problem.

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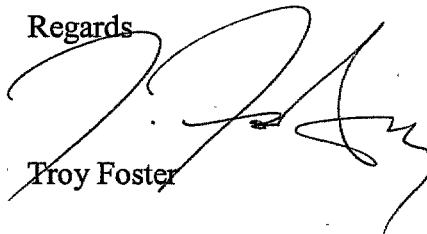
The truth is that not every case before the Circuit warrants the exacting process of an opinion for its resolution. And while some of the non-opinion class of cases may be addressed with a one-word, affirmed or reversed, many others require the court to give a bit more guidance to the lower court and the litigants. But that is where the guidance ends.

Allowing attorneys to sift through this mass of decisional law to argue the significance of minor factual and legal variances from precedent would have no beneficial effect on the legal process. Instead, it would muddy the waters of legal precedent in the Circuit by allowing citation to dispositions that were authored by judges that had no intention for them to be cited. It would also impact the behavior and judges and their staffs in a very negative way. The fact that these memorandum dispositions could be cited by later litigants would cause judges to place additional (and unwarranted) emphasis and time on them. As a result, the resolution of cases would be delayed. This additional delay would not effect the outcome of these cases in any material way but would instead be an additional double-check of fact, law and reasoning similar to what goes into an opinion.

Additionally, judges would be incentivized to issue the most concise memorandum dispositions possible so as to prevent the misinterpretation of any individual piece of information to attack other precedent in unforeseen ways in later cases. Without sufficient guidance to lower court judges, many cases that would have been easily disposed of by the lower courts on remand will find their way back up to the Circuit again. It is not clear to me how this could aid, in any way, the efficient administration of justice.

In closing, I urge the Committee to reject FRAP 32.1. Should the Committee have questions regarding this letter, it can feel free to contact me at 650.565.3600.

Regards



Troy Foster