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03-AP-378

By Fax: (202) 502-1755

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 Revision to FRAP 32.1

To the Committee:

I am writing to oppose the adoption of the proposed new FRAP 32.1 prohibiting the circuits from preventing citation to unpublished opinions. I am the First Assistant Federal Defender for the District of Hawaii. In my capacity as First Assistant, I have also served as the head of the appellate division for my office since 1991. Prior to having worked within the jurisdiction of the Ninth Circuit, I was a federal public defender in the Third Circuit. My wife also served as a supervising attorney for the Third Circuit Staff Attorneys Office. These experiences are the basis for my comments.

I have several concerns about the proposed rule. First is the question of retroactivity. Up to now, courts have issued unpublished decisions for a number of different reasons. All of these courts and judges, however, wrote these decisions with the knowledge and expectation that they could not be cited as controlling case law. For this reason, many of the these types of decisions are not detailed in their analysis nor do they fully cite to applicable case law. For example, there is no need to distinguish cases or to fully cite to controlling authority. In turn, published decisions do not themselves attempt to distinguish rulings from unpublished opinions. Thus, to now permit parties to cite to past unpublished decisions would create a serious and problematic distortion of potentially controlling case law.

Second, due to the case load of the Circuit Court, there is a real need to permit appellate courts to write unpublished decision in cases which do not present issues which merit citation. This permits the appellate court to dispose of a significant number of cases without the needless expenditure of a large amount of judicial resources while permitting the appellate court to

devote its resources to those cases deserving of attention. Thus, cases which the appellate court intends to become binding case law are more fully developed and more carefully analyzed, and, therefore, more compelling and meaningful to the development of the law. Making all cases, whether published or unpublished, subject to citation would necessarily lead to the watering down of the legal analysis contained in the decisions as judicial resources are spread too thin. Given the importance and significance of appellate decisions in the federal judicial system, this is not the direction the law should be taking.

I urge you to permit the issue to be decided by each Circuit and not to adopt the new rule.

Sincerely,

ALEXANDER SILVERT
First Assistant Federal Defender
District of Hawaii

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