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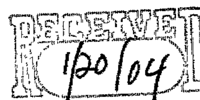

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January 20, 2004

VIA FACSIMILE: (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Re: FRAP amendment to permit citation of unpublished dispositions

Dear Mr. McCabe:

I am writing to you as a lawyer and former Ninth Circuit law clerk regarding your proposed amendment to the Federal Rule of Civil Procedure 32.1, "Citation of Judicial Dispositions." As you are likely aware, the proposed amendment would eliminate all restrictions "upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like." The proposed amendment committee notes state that "it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own 'unpublished' opinions." I hope that my letter will help provide the committee with such "justification."

This proposed amendment, while on its face may appear to provide more access to judicial precedent, actually ties the hands of the judges creating such precedent and creates a field of landmines for practicing attorneys. It does not "further the administration of justice."

As a former law clerk, I am well aware of the number of "published" dispositions that come out everyday. Because the judges and the law clerks are expected to be knowledgeable of the developing law, the office receives copies of slip opinions. It was nearly impossible to internalize the summaries of those opinions, let alone make it through every opinion. There is no realistic way for a judge, law clerk, or attorney to increase their knowledge of 80% more rulings as the proposed amendments would cause. However, the time spent reading these additional precedents is one of the smallest time issues that this amendment will raise.

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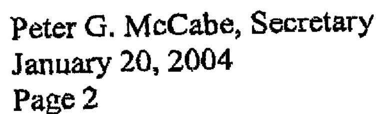


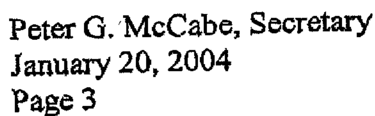
The time it takes to draft an opinion is more than double, even triple that of a memorandum disposition. Often times, judges make a ruling that can dispose of the case with little or no legal or factual analysis. In those situations, a memorandum disposition offers a fast alternative to disposing of the case. Under the appellate courts current work loads, this method of disposition is encouraged by both the judiciary and the attorneys arguing before the court. The fast disposition *is* a way of "furthering the administration of justice."

The proposed amendment would have the effect of requiring that the appellate courts treat every disposition as an opinion. This effect, in turn, will require an undue and unnecessary expenditure of time. To author an opinion, a judge must take into account not only the case as it applies to the parties, but also as it will be interpreted and applied as legal precedent in the future. It is the latter step that takes so much more time in the development of an opinion. A judge, or the panel of judges, must first articulate the legal analysis necessary to dispose of a matter and then hypothesize future scenarios to determine how that legal precedent may be applied in the future. Such a task would be impossible if the appellate judges were required to do that for every case before them. We should neither impose such a burden on them, nor should we expect them to perform this impossible mission. Moreover, individuals who use the legal process as a way of dispute resolution should not be expected to suffer the significant delays that this amendment will cause.

Next there is the practical affect of the amendment -- how will this apply to dispositions previously written. Clearly, the judges did not create them with the thought that they would be applied as legal precedent. Thus, they often include a little to no factual background or legal analysis. While the parties to a particular case may have understood the court's ruling, we cannot expect to apply such a skeletal disposition as precedent.

That the comments to the proposed amendment purports to state that these unpublished opinions are only persuasive precedent and not legally binding precedent is irrelevant. The practical effect is that they will be citable and used as precedent – when in fact they were not prepared or intended to have any such force. The fact of the matter is that when judges create precedent, they make a very deliberate choice as to the wording of their decisions. The current unpublished dispositions have not had the same conscious consideration and should not be used as even persuasive precedent. As a practicing attorney, I appreciate the deliberated thought that a judge puts into establishing a precedent.

Now that I am a practicing attorney, I can also see from the other side that this proposed amendment will have an impractical and potentially dangerous effect. Attempting to wade through the additional "tens of thousands" of opinions, as described in the comments, is neither

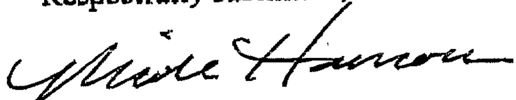


an efficient use of my time, nor is it practical to expect an attorney to have a grasp over that much case law. It would be impossible for a client to use his/her resources to conduct exhaustive research on any issue.

This leads directly to the dangerous element I mentioned – risk of committing professional malpractice. It is a uniform professional rule in every state that lawyers are expected to know and provide the court with case law on any given issue. It would be difficult to discern the precedential effect of skeletal memorandum dispositions – how can you cite a case precedent without ample facts and the legal analysis to know where the appellate court was deriving its ruling? Moreover, it would be easy to overlook a case that provides no legal or factual discussions, from which electronic search engines would pick up key words or phrases. However, the professional rules would still require the attorneys to perform such an exhaustive and impossible search. This is a classic example of an "attorney quagmire."

I have provided you with only a few example reasons of why amending the rules to allow citation to memorandum disposition or otherwise unpublished opinions is not a good idea. I sincerely hope that you will take time to consider my comments, concerns, and suggestions. Thank you in advance for your consideration.

Respectfully submitted,



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