United States Bankruptcy Court
Central District of California
Roybal Federal Building
255 East Temple Street, Suite 1660
Los Angeles, California 90012
213-894-5091

Chambers of
Barry Russell
Chief Judge

03-AP-405

February 6, 2004

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedures
Administration Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed F.R.A.P. 32.1

Dear Mr. McCabe:

I am writing to express my personal opposition to proposed F.R.A.P. 32.1. I am in total agreement with the comments sent to you by Ninth Circuit Judge Alfred T. Goodwin and those of Ninth Circuit Judges Alex Kozinski and Stephen Reinhardt.

As a Bankruptcy Judge for over 29 years, including fourteen years as a member of the Ninth Circuit Bankruptcy Appellant Panel, I would like the committee to consider the adverse effect such a rule change would have on those involved with bankruptcy litigation, including appellate and trial judges, counsel for parties and *pro se* parties.

As a member of the BAP, I was guided in deciding whether to publish an opinion by the Ninth Circuit BAP Rule 8013-1, DISPOSITION OF APPEAL which provides in pertinent parts as follows:

(a) OPINION or MEMORANDUM. The Panel may determine that a written disposition of a matter before the Panel will be designated an OPINION if it:

(1) Establishes, alters, modifies or clarifies a rule of law;
(2) Calls attention to a rule of law which appears to have been generally overlooked;
(3) Criticizes existing law; or
(4) Involves a legal or factual issue of unique interest or substantial public importance.

As a former member of the Ninth Circuit BAP, I can tell you that there is often a huge difference in the effort involved in writing a published opinion as opposed to a memorandum disposition. Although the result of the appeal will be the same in both situations, the style and content may vary dramatically. A memo is obviously written mainly for the benefit of the parties involved in the litigation. The court assumes that the parties are aware of the relevant facts and the time and effort in developing the facts is less than in an opinion. But even more important is that a memo is aimed at letting the parties know who won and why. Therefore, in a memo, it is much less likely that there will be the necessity of a concurring opinion to highlight a slightly different theory as opposed to a published opinion.

A published opinion is written not only to decide the case at hand, but to explain to the world, not only why the court decided the case, but also to be instructive on how future similar issues should be decided. Obviously, opinions are more polished as a literary work than memos. As a member of the BAP, I spent far more time drafting an opinion and far more time dealing with the two other judges on the panel with suggestions for modifying the wording of my proposed opinions. As a result, a great deal more time is spent on opinions.

As things are today, too many published opinions are cited by parties or their counsel, which have marginal or no relevance to the issues at hand. Having to deal with these opinions either by the opposing side, the trial and appellate judges is burdensome, but necessary.

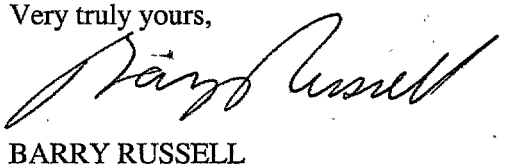
However, if all appellate dispositions may be cited, the imposition on those concerned with dealing with an additional huge number of opinions will unduly burden an already overburdened judicial system. This adverse impact would be particularly severe in the bankruptcy arena. For example, a great number of bankruptcy matters both at the trial and appellate level do not involve a great deal of money, resulting in a relatively small litigation budget for litigants. Obviously, having to research, cite and distinguish a greater number of opinions is a cost many litigants cannot afford.

The same impact would be imposed on the federal judiciary at both the trial and appellate level. Again, having to deal with a much larger number of opinions will also impose an undue burden on a already overburdened system.

Under the present system, I am confident that the Circuit Court and other courts issue published opinions only in cases in which they feel will advance the law in the area.

I believe that the system works very well as it is, and in this case, more is definitely not better.

Very truly yours,



BARRY RUSSELL
Chief Judge
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