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03-AP-482

VIA FACSIMILE AND 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 am writing to you about the Advisory Committee's proposal (FRAP 32.1) to effectively override the Ninth Circuit's rule relating to unpublished dispositions, Circuit Rule 36-3.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 and as someone who practices in the Circuit, I am familiar with the workload that the clerks and judges on the Circuit face. As someone whose practice involves considerable appellate work, I have a particular interest in the efficient publication of consistent and clear legal rules by the various Circuits. Elevating the circuits' unpublished dispositions to the status of citable precedent (whether *de jure* or *de facto*) will only result in a massive drain on their resources, substantial and unwarranted delay of circuit decisions and confusion in the case law. Simply put, the burden on judges, law clerks and lawyers alike will increase astronomically, while the benefits would be incremental at best.

After reviewing FRAP 32.1 and the supporting commentary, it seems to me that the drafters simply did not take into account experience in our Circuit, as well as others. The Ninth Circuit decides over 4,500 cases a year. During my tenure in 1999-2000, we heard approximately 450 cases on three-judge panels and took writing responsibility in well over a third of those cases. Putting aside each chamber's responsibility to review the written work of other chambers on the three-judge panels, assess the merits of en banc calls, participate in en banc panels and various other tasks, it is inconceivable that four law clerks and a judge could produce a dozen opinions per month.

That, however, is precisely what FRAP 32.1 will require if adopted. But the simple truth is that not every case before the Circuit warrants the exacting process of an opinion for its resolution. And while some of the cases in which unpublished decisions are appropriate may be addressed with a one-word ruling, many others require the court to give more guidance to the lower court and the litigants. But the guidance needed for the litigants or the lower court, both of whom are intimately familiar with the issues and the record is a very different thing than the guidance needed by courts and lawyers who may be unfamiliar with the particular case but seek to apply it to subsequent, unrelated litigation.

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Allowing (or forcing) attorneys to sift through this enormous 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. It would confuse legal precedent in the Circuit by allowing citation to dispositions that were authored by judges who had no intention that those opinions be cited in subsequent, unrelated cases. It would, moreover, impact the behavior of judges and their staffs negatively. 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, without affecting the outcome of these cases in any material way.

In a certain sense, the proposed rule creates precisely the wrong incentives. Were it to be adopted, judges would be inclined 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 or the litigants, 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. This does not aid the efficient administration of justice.

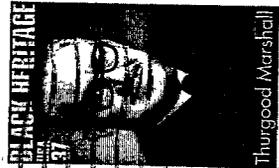
In closing, I urge the Committee to reject FRAP 32.1. Should the Committee have questions regarding this letter, it can feel free to contact me.

Regards ,



Anne M. Voigts

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