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To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Proposed Rules Change, FRAP 32.1

03-AP-096

I write to comment on proposed Federal Rule of Appellate Procedure 32.1. I write as a former Ninth Circuit Court of Appeals clerk, and as a current practitioner before that court (and other appellate courts). Of course, the views expressed herein are solely my own, and should not be imputed to my current or former employers.

My comment is simple: The proposed Rule is a terrible idea; it should not be adopted.

The proposed Rule would essentially require that unpublished decisions be citeable, though it does not prescribe anything about their precedential value. This defeats the two principal purposes for having unpublished decisions in the first place. First, some cases are so clear that they can be decided in a few paragraphs. Second, deciding such cases in short, unpublished opinions leaves more time for judges to attend to maintaining a workable body of precedent despite what are often overwhelming caseloads.

Of the myriad reasons why the proposed Rule is inadvisable, two stand out. First, almost by definition, unpublished decisions are ones on which judges do not expend the time and effort in drafting that would be expected for a published decision. These few-paragraph dispositions, which often are not models of clarity, ought not be treated the same as more carefully crafted precedential decisions.

To be sure, FRAP 32.1 purports to leave the precedential effect of these decisions up to the individual courts of appeal. Practically, however, this is irrelevant. For if these decisions may be cited, any competent attorney would try to line up as many as possible in support of his client's case. Moreover, other judges would be hard-put to ignore the work of their colleagues.

This leads to the second reason this Rule ought not be adopted: it would impose tremendous burdens on attorneys--and ultimately, on the clients who pay their bills. Instead of restricting research time to the relatively small universe of published decisions (I say relatively because we all know the speed at which the F.3d grows), attorneys would be forced to spend hours trolling through haystacks of unpublished decisions in search of needles to support their clients' cases. Research time could easily triple, or worse. Given what large firms charge

for younger associates' time, client bills would grow exponentially.

Perhaps the dire consequences I envision would not come to pass across America. I happen to have clerked in the court of appeals for the Nine Western States, a court with over twice the caseload of the next busiest circuit, and that experience has colored my views. Perhaps other, smaller courts could handle a rule like the one proposed, and indeed, would even prefer to operate in the fashion it dictates. But of course, this leads to the perfectly sensible question: what need is there for the proposed uniform Rule? As things stand, individual courts may determine for themselves the citeability of their decisions, and the precedential effect of unpublished decisions. This course seems to work well enough, and for the reasons expressed above, is far preferable to mandatory citability rule.

In sum: proposed FRAP 32.1 is unnecessary, and worse, would almost certainly result in unnecessarily increased expenditures of time, effort, and money by courts, advocates, and clients. It should not be adopted.

Respectfully,
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