January 21, 2004

03-AP-254

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

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

Dear Mr. McCabe

As a former staff attorney and practitioner in Ninth Circuit Court of Appeals and a current judicial staff attorney with the California Supreme Court, I write in opposition to your effort to promulgate ~~a~~ national rule regarding what is or is not binding legal authority in each circuit.

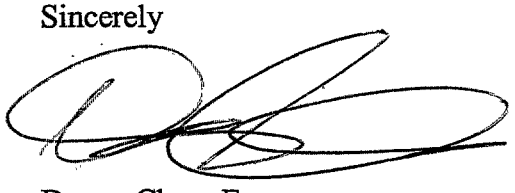
In a perfect world, every case would be decided by a carefully crafted published and citable opinion. But that perfect world, if it ever existed, no longer exists today. With the routine appeal of every criminal conviction, the compound appeal of that conviction and the sentence, and all the collateral attacks, at taxpayers' expense, not to mention the routine appeals in social security, immigration prisoner cases– the goal of a "perfect" world fell apart. The sheer volume of appeals having little or no factual differentiation, little or no legal merit, and requiring little or no legal research, accounts for at least 50% of the federal court's caseload. Only through the use of non-binding, "unpublished" decisions can the court keep up with its workload and get back to litigants with a timely, short and reasoned written explanation of the outcome of their appeals.

If these "unpublished" memoranda are given precedential status, litigants will feel compelled to cite and address them in their briefs. Because precedential and citable memoranda require more care and detail in their crafting, overworked and understaffed courts will respond by affirming more cases without an opinion (AWOP). As of now, the Ninth Circuit does not have this problem. But the proposed rule will create it.

And the negative ramifications are staggering. As an initial matter, the increased use of AWOPs does a disservive to litigants. Indeed, as a practicing lawyer, I welcomed a reasoned explanation for the court's holding, even if I cannot cite to it in another case. Moreover, if you open this vast body of informative but non-citable authority to citation in briefs, they will be cited, and clients will be billed for hours of additional research time. Judges and their staffs will also have to spend more time researching these previously uncitable opinions. As a result, benchmemos and opinions will be resplendent with string cites and distinguishing verbal ballet, adding to the din and confusion of the law of the circuit. The likely result is further delays in resolving appeals.

In short, I find it difficult if not impossible to understand how anybody—much less courts and litigants—will benefit from the proposed rule. Please leave well enough alone. Let the circuits sort this out for themselves.

Sincerely



Danny Chou, Esq.