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03-AP-277

January 28, 2004

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 now a practitioner in Ninth Circuit Court of Appeals, I write in opposition to your effort to promulgate a national rule regarding what is or is not binding legal authority in each circuit.

Certainly I agree that in a perfect world, every case would be decided by a carefully crafted published and citable opinion. That perfect world, if it ever existed, has been overwhelmed by events. With the routine appeal, of every criminal conviction, the compound appeal of that conviction and the sentence, and all collateral attacks, at taxpayers' expense, not to mention routine appeals in social security, immigration prisoner appeals – 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. It is only through the use of non-binding, "unpublished" decisions that the Court can possible keep up with its workload and so, get back to the litigants with a timely, short and reasoned written explanation of the result in each case.

If these "unpublished" memoranda are given precedential status, each of us will feel compelled to cite them all in briefs. Overworked and understaffed courts will respond to the resulting citation by affirming more cases without an opinion (AWOP). As of now, we are more or less free of this in the Ninth Circuit. As a lawyer, I welcome the reasoned explanation, even if I can't cite to it in another case. If you open this vast body of informative but non-citable authority to citation in briefs, they will be cited, and my clients will have to be billed for hours of additional research time. My opposition will repeat the process. Judges and their staffs will repeat the research time, and bench

memos and the resulting decisions will be resplendent with string cites and distinguishing verbal ballet, adding to the din and confusion of the law of the circuit.
Delays will worsen.

In short, I find it difficult if not impossible to understand how my clients will benefit from any of this. Please leave well enough alone. Let the circuits sort this out for themselves.

Sincerely,

Nancy Tompkins