

*United States Bankruptcy Court  
Southern District of California*

JACOB WEINBERGER UNITED STATES BANKRUPTCY COURTHOUSE  
325 WEST "F" STREET  
SAN DIEGO, CALIFORNIA 92101-6989



**JOHN J. HARGROVE**  
Chief Judge

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January 28, 2004

03-AP-281

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: Proposed FRAP 32.1

Dear Mr. McCabe:

On behalf of my three colleagues and myself, I write to advise that the judges of this Court, unanimously oppose Proposed FRAP 32.1.

First of all, the proposed change would be extremely burdensome to appellate courts, particularly, the Ninth Circuit. I know that you are aware that Judge Alex Kozinski has testified before the Subcommittee on Courts, the Internet, and Intellectual Property, on this point, so I refer you to his comments for his point of view.

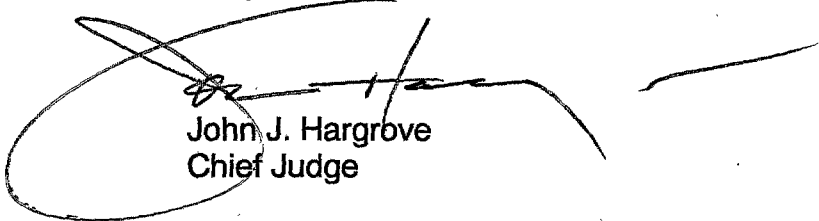
Let me illustrate the increased burden on the Circuit from a bankruptcy perspective. As I read the proposed rule and the Committee Note, not just any unpublished Circuit opinion, but any "unpublished" opinion may be cited to the Circuit for its persuasive value. In my 18+ years as a bankruptcy judge, I can state with some accuracy that bankruptcy judges are prolific writers. Partly because our published opinions are published by the West Group in its Bankruptcy Reporter and partly because our opinions can sometimes be complex, bankruptcy judges write numerous "memorandum decisions," the majority of which are not published. Practitioners handling bankruptcy appeals will undoubtedly deluge the Circuit with these unpublished, and in many instances conflicting bankruptcy court opinions, in an attempt to persuade the Circuit that the unpublished opinions represent a "trend" or "mega trend" that is developing within the Circuit or throughout the country. My colleagues and I in this District often do not publish a ruling because we have determined that the case does not change or expand existing law or procedure. Under proposed FRAP 32.1, the Circuit will have to consider these so called "for what it's worth" unpublished opinions, for whatever persuasive value they serve.

In the bankruptcy arena, the most compelling reason against the use of "unpublished" opinions is the increased expense which will occur if FRAP 32.1 is enacted. Keep in mind, that the majority of the motions and adversary proceedings which bankruptcy judges encounter, involve debtors who, for the most part, cannot afford to pay their attorneys for additional research and analysis encountered in the use of unpublished opinions.

If Circuit opinions are cited, bankruptcy court judges will probably rely on them as precedent, even if they are unpublished.

Bankruptcy practitioners already attempt to cite unpublished opinions issued by my colleagues in this district, as well as opinions by other bankruptcy judges in this Circuit. Although the proposed rule is an appellate rule of procedure, the proponent of an unpublished Circuit decision favoring its legal position will most certainly attempt to argue to the bankruptcy court that the unpublished decision represents the "thinking" of the Circuit on the issue. The point is, more time and expense will be incurred by the parties, because of the increased volume of unpublished case law.

Respectfully submitted,



John J. Hargrove  
Chief Judge

JJH:ksw