03-AP-300

731 Alvina Court
Los Altos, CA 94024
February 6, 2004

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

with copy by fax (202) 502-1755

Re: FRAP 32.1

Dear Mr. McCabe and Committee:

You may wonder why I'm writing – not a judge, not a clerk, not a litigant, not even a lawyer. Well, I'm a businessman, a concerned citizen and, as a former lawyer and founder of Hyatt Legal Services, I know enough of the issue to be Really Concerned.

Let me make three main points about why I think your proposed rule is a bad idea.

First, it drives up cost. As a businessman, I know that when you drive up costs, you reduce the quantity of what's delivered. In some cases this precludes someone from getting justice altogether. And when you drive up costs greater than benefits, you reduce the value of the eventual outcome in all cases.

How does it drive up cost? Well, it makes searching precedent more expensive, and, God forbid, the litigants may find fact patterns and ... how shall I say this delicately? .... the less-than-pristine language in an unpublished opinion. Debating distinctions without differences is the precise sort of lawyering that interposes delay, cost, frustration and the increasing perception that The System is out of control. Even conscientious lawyers who aren't abusing the system will feel the need to pursue every angle "with zeal and fidelity" – even if it drives minute analysis around an "issue" created by uncareful explanations of dispositions not intended for use beyond the parties. At $400/hour ... or even $100/hour ... this quickly makes justice too expensive.

As the co-founder of Hyatt Legal Services, I have had a lifelong concern with public policies that impede access to the legal system. We tried to lower the cost of legal representation and to take the mystery out of access and pricing. If you adopt a rule that drives up the cost of litigation/appeal, people will seek Other Justice ... often outside the system, even sometimes violently.

Second, I remember enough about the docket of the Ninth Circuit to remember how busy it was in the 70s. How much busier is it today? How many more judges are you going to add to the bench to do this extra work? And what will that do to the increasing difficulty of maintaining the harmony of decisions within the Circuit, not to mention creating potential mischief for the Supreme Court's maintaining inter-Circuit consistency?

I said above that this proposed rule drives up cost without concomitant benefit. None of the proposed benefits strikes me as of major value. Are you worried that judges won't be as conscientious for unpublished decisions – to the extent that they would change the outcome if forced to publish their decisions? Well, the federal judges I've met are all highly conscientious people, and I certainly doubt that they would cut corners in any way that would affect the outcome. Mostly, they just want to dispose of an "obvious" case without hand-crafting every word and comma. If the case is debatable at all, my view is that they would a) take deep care and b) publish it.

If you would rather not simply rely on the character of your brethren and sistern of the Bench to maintain quality, let me just ask you the following three questions:

1) What percentage of unpublished decisions would reach a different result (reversed or affirmed) if they were forced to be published?

2) What percentage of published opinions actually do reach a different result upon rehearing or rehearing en banc?

3) Which percentage is higher?

That is, I think you'll agree that publication probably doesn't add any differential on the results that the court itself would seek to correct. If that's true, why impose extra cost?

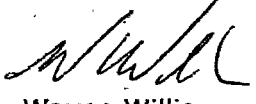
I could extend this economic view by talking about "trading off" some unfortunate outcomes on some litigants for the benefit of more justice for society at large – that even if some one litigant gets a bad result, society is better off with lower hurdles for most litigants to get to an appeal at all.

I feel especially confident about this point because unpublished opinions are not the last word. They can be appealed further ... en banc or to the Supreme Court. (That is, there is a procedural remedy available to any appellant unconvinced by the disposition.) Given this potential remedy, then, forcing a blanket increase in cost and work is totally unjustified.

Last, I think each Circuit should be trusted to organize its own affairs. Whatever happened to local rule? Have you folks from DC been in Crowded California lately? It's a whole lot different that when I lived in Kansas City, let me assure you. How much bigger is the Ninth than, e.g., the Eighth?

Enough. I hope you don't make this mistake and make Justice even harder to get.

Sincerely,



Wayne Willis