pawlak & associates
<pawlakpatent@yahoo.com>
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To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Attn. Peter G. McCabe

03-AP-449

Dear Mr. McCabe:
Enclosed are comments (regarding the proposed FRAP 32.1) that were faxed today to 202-502-1775 from 408-270-5593.
Elizabeth Pawlak

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frap32-1-comment.pc

REGISTERED TO PRACTICE BEFORE THE U.S. P.T.O.:
Elizabeth J. Pawlak, J.D.; Dr.rer nat.

LANGUAGES:
German
Russian
Polish
French

PAWLAK & ASSOCIATES
PATENT PREPARATION, PROSECUTION & LICENSING
PATENT TRANSLATIONS
P.O. Box 1867
WASHINGTON, DC 20013, U.S.A.
TELEPHONE 301-441-3888
TELEPHONE 408-270-5593
TELEFAX 408-270-5593
MOBILE PHONE: 408-316-2146
www. pawlakpatent.com
Email: pawlakpatent@comcast.net

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VIA E-MAIL to Rules_Comments@ao.us.courts.gov
AND FASCIMILE TO 202-502-1755 (Attn: Peter.G. McCabe)

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: Comments on proposed FRAP 32.1

Dear Mr. McCabe:

In general, I support the proposed FRAP Rule 32.1. However, for the reasons disclosed on my web site www.secretjustice.org, the entire content of which is incorporated by reference to and made part of this comment, I believe that and Subdivision (a) of the proposed FRAP 32.1 shall read:

> **"Citation permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions."

Section 205 of the e-Government Act of 2002 ("the Act") states in pertinent part and in mandatory language that,

> "the chief judge of each circuit …**shall** cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:
> 5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format." (emphasis added)

Once the Act is implemented, all dispositions issued by the court must be "published." Plain pure and simple. Therefore, it is misleading for the Committee to claim --as it does in its Note-- that FRAP 32.1 "does not require any court to issue an "unpublished" opinion or forbid any court from doing so." To repeat, the commands of Section 205 of the Act 2002 are mandatory and not merely permissive.

Furthermore, any reference to "non-precedential," "not precedent" dispositions in Subdivision (A) of the rule is a tacit endorsement of illegal, let alone plainly unconstitutional designation of the entire class of judicial opinions, orders, judgments and other written dispositions (collectively, the "dispositions") as "non-precedential," "not precedent" or the like. This cannot be done. Neither the Constitution of the United States nor any statute allows the federal judiciary to render advisory, "non-precedential" dispositions. Federal courts cannot pick and choose the purposes for which their dispositions are binding or cited. What is binding upon the courts for one purpose (e.g., res judicata, collateral estoppel, claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice) is also binding for all other purposes.

If appellate courts will respond to the enactment of FRAP 32.1 by stopping to provide any reasons or explanations, whatsoever, for the dismissals or affirmances in tens of thousands of their dispositions, be it so.

The comments of judges Silverman and Kozinski unequivocally confirm that the entire class of dispositions (in the most complicated and the most difficult –legally and factually – appeals as of right) was and continues to be rendered in **a vacuum**, literally, by three circuit judges whose names appear on these dispositions. Furthermore, the comments of the federal judiciary and its former law clerks judges unequivocally confirm that the blind rubber-stamping of "mem-dispos" drafted by plainly-incompetent non-judicial administrative personnel (paralegals and staff attorneys) is covered up by designating such dispositions as "unpublished," "not for publication," "nonprecedential," "not precedent," or the like." For example, while Judge Silverman states in the pertinent part of his comment, that:

> "Here's how screening panels work: Three judges convene in person, by video or by telephone. The panel hears from 25 or 30 staff attorneys who, in turn, quickly summarize the cases they are presenting. At the outset of each presentation, the staff lawyer furnishes to the panel a pre-drafted proposed mem dispo" (03-AP-075; Silverman, J.),

Judge Kozinski admits that:

> "[Three circuit judges whose names appear on the unpublished disposition] had little or nothing to do with the drafting of the disposition, which in all probability was drafted by a law clerk or central staff attorney**...[U]npublished dispositions-unlike opinions-are often drafted entirely by law clerks and staff attorneys**... This means that these dispositions were drafted by our central staff and presented to a panel of three judges in camera, with an average of five or ten minutes

devoted to each case....**[T]he disposition, which is presented as a final draft by staff attorneys...[with] language that is lifted from a bench memo and pasted wholesale into a disposition [and] can provide a veritable gold mine of ambiguity and misdirection....** [U]npublished dispositions do not get, any meaningful en bane review--and couldn't possibly-- and thus cannot fairly be said to represent.the view of the whole court."

Thus, it is crystal clear that our federal appellate judiciary has abdicated its duty of analyzing the facts and applying the relevant law to the facts. Given that the entire class of dispositions (in the most complicated and the most difficult –legally and factually – appeals) was--and continues to be-- rendered in a vacuum, the issue is whether all of such dispositions are null and void ab initio. I think that they are.

Sundry of the reasons the federal judiciary and its former law clerks vociferously advance in opposition of the proposed FRAP 32.1 is nothing short of breathtaking. For the detailed evaluation of the "reasons", see www.secretjustice.org.

Respectfully submitted,

Elizabeth J. Pawlak