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 Addendum

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 February 5, 2004

I have written separately comments regarding FRAP 32.1 which I strongly support. I want to offer an idea that might significantly reduce appellate volume. Because volume is a purported rationale for no citation rules, I offer this suggestion to reduce volume for what it may be worth.

Indigent criminal appeals are constantly bemoaned for clogging the appellate courts. Many who describe the process seem to paraphrase the comedian Yacov Smirnoff, essentially saying that underpaid attorneys pretend to write briefs, and the court pretends to read them. There is a potential for enormous harm here that goes beyond error. When a junior law clerk decides no error is presented, it is not she but three appellate judges that sign off on the case. Then the same extraordinary respect for those three signatures that Judge Kozinski decries as unwarranted in the precedential arena attach to the court's ruling. To the public that defendant has had a full fledged appeal, and a very high barrier to further consideration is created.

Given the "screening" processes of the appellate court, is it possible that a convict is better off with out such a perfunctory appeal?

Would our appellate courts be benefited and criminal defendants and wrongly incarcerated persons as well, if the government would pay a generous fee to attorneys that obtain successful appellate relief rather than small fees for filing appeals? This would create, in essence, a bounty on error in the

criminal conviction process? Wouldn't that seem appropriate in a free society?

In this way attorneys would first screen each case for appealable error, and it would be their responsibility to explain to prospective clients the absence of appealable error. If the defendant is not satisfied with any evaluation she or her attorney would be free to shop for appellate counsel who understood and believed in the issues to be raised, and whose record indicated sufficient skill to properly present those issues to an appellate court. Attorneys would not bring frivolous appeals that waste courts attention, if for no other reason than to preserve their reputations.

The filing of an appeal would then itself indicate there is a problem worthy of consideration by the justices. Routine appeals would be eliminated because attorneys and not the screening department of the court would deflect them.

To encourage the taking of marginal cases the fee could be substantial. Considering that the government now pays appellant's legal fees, respondent's legal fees, and for the court's time as well, there is much that will be saved if criminal appellate volume is reduced by a theoretically possible 95%. If that were possible the government could theoretically pay the sum of 19 times the normal appellant's fee + 19 times the costs incurred for the state's response + 19 times the average court cost to each successful appellant's attorney and still come out even.

In all of this criminal defendants with real appellate issues would come out better, because the real issues they have to present will be more powerfully presented, and their arguments will be presented to courts not insensitized by an overwhelming volume of largely meaningless appeals.

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