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03-AP-158

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

January 20, 2004

Dear Secretary McCabe:

I am writing to express my opposition to Proposed Federal Rule of Appellate Procedure 32.1. I write as a law professor who has taught constitutional law, and who has clerked on the U.S. Court of Appeals for the Ninth Circuit.

The wording of a precedential decision—whether it's binding precedent or merely persuasive precedent—is even more important than its bottom line. That's why judges pay a lot of attention to the words of their published opinions. They don't just make sure that the result is right, and properly arrived at. They also make sure that all the reasoning is as clear as possible, and as hard as possible to misconstrue. They and their clerks often pore over dozens of drafts of each opinion, just to make sure that it won't have some unintended effects.

Unfortunately, federal appellate judges simply can't devote this sort of attention to every single reasoned disposition they publish. There just isn't enough time, given the burden of work under which the judges labor. Nor do the great majority of decisions, which are merely straightforward applications of existing law, merit such effort. Unpublished dispositions aim to explain the law to the parties, so that the parties feel that their case has been taken seriously, and that the judges are applying the rules. But they often aren't crafted with the attention needed to prevent their being misconstrued and misapplied in the future. Allowing such decisions to become precedent thus risks creating much confusion for litigants, lawyers, and district court judges.

Nor is it enough to say that such decisions are just persuasive precedent rather than binding precedent. The trouble with the unpublished decisions, as I've argued, is that they may be (understandably) not very carefully or thoroughly reasoned. But this is a very hard argument for lawyers to make to district court judges, or for district court judges to make in their opinions. "You should not follow the Ninth Circuit's unpublished decision because it may well have been

drafted in haste and with little editing by a staff attorney, with little attention or supervision by the judges" may be an honest and accurate argument. But given the understandable and proper respect that lawyers and judges are trained to express for the courts of appeals, it may be a hard argument to make. The unpublished decisions may thus exert a far greater effect over lower courts, lawyers, and litigants than they ought to exert—and that the court of appeals itself wants them to exert.

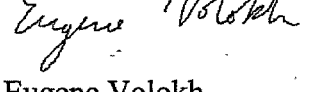
So one consequence of the proposed rule will be confusion and risk of legal error. Another consequence will be more work for lawyers, and thus more expense for litigants: If there are three published decisions and twenty unpublished decisions on a particular point, Proposed Rule 32.1 may make a careful lawyer may feel obligated to read not just the three but all twenty-three.

Even merely persuasive precedent, after all, might be relevant to a court's decision. And if some of the twenty newly citable decisions aren't very carefully worded, then it may take still longer to fully evaluate them, and to craft an argument based on them. So the clients will end up having to pay more—or, if they instruct their lawyers to stick just with the published decisions, they will risk being handicapped relative to the clients who are willing to pay more.

The final consequence of the proposal will likely be that circuit courts will just shift more towards the one-line unpublished orders, which simply say "Affirmed" or some such. Some circuits already do this; Proposed Rule 32.1 would push more circuits into doing that. Litigants and lawyers will thus lose any explanation of why they lost (or won). The U.S. Supreme Court will find it harder to review petitions for certiorari filed based on these decisions. And the quality of justice will suffer, because judges, clerks, and staff attorneys will no longer have to go through the discipline of explaining—even briefly—the details of their reasoning.

The ability to convey a reasoned decision, but one that's not so carefully worded that it deserves to be precedent (persuasive or binding), is an important option for a court of appeals. Taking away this option will be bad for all involved: court of appeals judges, district court judges, lawyers, and litigants. I therefore hope the committee will reject the Proposed Rule.

Sincerely Yours,



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