03-AP-193

Court of Appeal

FOURTH DISTRICT, DIVISION III
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CHAMBERS OF
W. F. RYLAARSDAM
ASSOCIATE JUSTICE

January 21, 2004

Mr. 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:

Please forward this letter to the committee that is considering proposed FRAP 32.1.

The controversy underlying the proposal to make all opinions citable also exists in California. There have been a number of proposals, both in the California Legislature and before our Judicial Council to repeal California Rules of Court, rule 977. The rule prohibits the citation of "unpublished" opinions.* I strongly oppose such a change and fear that, if proposed rule 32.1 is adopted, it will increase the pressure in our state to repeal the prohibition on citing such opinions. Such a change would adversely affect the practice in our courts.

I have been an associate justice of the California Court of Appeal for over eight years. Each year my chamber authors approximately 170 opinions and, in addition, I sign off on approximately double that number authored by my colleagues' chambers. We have great difficulty keeping up with the number of appeals filed in our division and the same is true in

* I use the usual term "unpublished" but suggest the term is inappropriate. This unfortunate term has enabled some opponents to the prohibition on citability to label these opinions as "secret opinions." Because all opinions are now published on the internet, a more appropriate designation would be "non-citable" opinions.

other divisions and districts of our appellate court. If each of our cases required an opinion meeting the standards for published opinions, we would not come close to being able to keep current on our appeals.

California's constitution requires a full written opinion in all appellate cases. California's approximately 100 appellate judges, constantly struggling with ever increasing case-loads, issue about 14,000 opinions each year. Ten percent of these opinions are published in the official reporter.

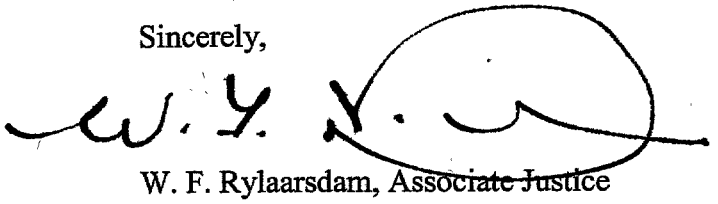
If all these opinions were treated as worthy of equal precedential value, at least the following adverse effects would result:

- Because of concern about phrases in appellate opinions being taken out of context when applied to other facts in later litigation, great care is required in editing "published" opinions. Thus a publication requirement would add to an already oppressive workload for our appellate judiciary and to further delays for impatient litigants. Although all cases are worthy of full consideration, where the sole audience of the opinion is the parties and their lawyers, substantially less time is required to fine-tune all of the language of the opinion.
- Citability of "non-published" opinions would result in a ten-fold increase in the data-base to be searched by the conscientious California legal researcher. As a result, the time needed for legal research and the cost of appeals, already unreasonably high, would greatly increase. This would be true both for the appellate court itself and for litigants. As to the latter, this increased cost might well cause an economic bar to the pursuit of or resistance to appeals, resulting in effectively blocking some litigants' access to our appellate courts.
- For the same reasons, the litigants in our trial courts and the judges in those courts would face a greatly enlarged data-base to be researched, resulting in greater costs and lesser access to the civil justice system and greater costs to an already severely overburdened criminal justice system.
- A rule permitting all cases to be cited confuses the error-correcting function of our appellate courts with the law-making function of these courts. Most opinions affirm the trial court on the basis of existing legal principles, statutory or common law, relied upon by the trial court. In the far smaller number of cases where the trial court is reversed or the judgment is revised, again, in most instances the result is compelled by existing legal principles.
- California has adequate procedures to permit the parties to litigation as well as other interested persons and entities to address the issue of publication. Requests to publish non-published or de-publish published opinions are frequently addressed to our Courts of Appeal and Supreme Court, providing another screening mechanism to insure that opinions worthy of publication are, in fact, published.

As a member of the California Appellate Judiciary, a rule change relating to citability in the federal courts would have little effect on our work or the work of litigants appearing before us. But a change in the federal rule would likely result in our becoming unable

to resist the pressures seeking a similar change in our rules. Such a change would adversely affect the rights of litigants in our courts, make legal research even more expensive than it already is, and impose additional time-consuming duties on an already overburdened court system.

Sincerely,



W. F. Rylaarsdam, Associate Justice
California Court of Appeal