03-AP-376

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Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the Untied States Courts
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I am writing in opposition to proposed Federal Rule of Appellate Procedure 32.1.

The views I express in this letter are my own. I believe my background and experience, however, may provide a somewhat different perspective on this issue. I have been in private practice for more than twelve years, concentrating primarily on bankruptcy and insolvency law. I am a member of the Federal Advisory Committee on Bankruptcy Rules and am Faculty Chair of ALI-ABA's Fundamentals of Bankruptcy Law program. I am also a member of the Boards of Directors of the California Bankruptcy Forum and the Los Angeles Bankruptcy Forum.

The premise underlying proposed Rule 32.1 is that the judicial system would benefit from increased access to, and citation of, unpublished appellate decisions for their "persuasive value." I respectfully disagree for the following reasons:

More Law Does Not Equal Better Law.

The Federal Courts of Appeal decide approximately 28,000 cases each year.[1] More than eighty percent of these cases are decided by unpublished dispositions.[2] Although

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1 See Judicial Business of the United States Courts, Annual Report of the Director, 2002, at Table S-3.

2 Id.

unpublished decisions serve an important function for the litigants in the particular case, I do not believe that such decisions can, or should, be considered "persuasive" in connection with the resolution of any other case.

I am confident that the Courts of Appeal work hard to carefully determine the *result* in every case that comes before them. It is simply not possible, however, for the Courts to devote the time necessary to fully explain the reasons for their results in every case.

For example, in many cases the result will not depend upon one critical fact, but rather upon a multitude of facts which, when considered together, compel a particular outcome (e.g., search and seizure cases). Such cases are very common in the area of bankruptcy law, where often equitable principles must be applied to complicated factual circumstances. The parties themselves are aware of these circumstances, and thus in issuing an unpublished decision, the Courts of Appeal need not explain every factual and legal nuance. If, however, such decisions could be cited as "persuasive" in countless future cases, the Courts' failure to set forth a complete recitation of the facts and the law could lead to confusion.

As another example, parties often fail to raise issues that may be persuasive, if not dispositive, were they properly presented (e.g., the applicability of a statute that was not cited by either party). Or, the parties raise the right issues, but the quality of their arguments may not be up to par. Although I believe that the Courts (and their law clerks) routinely spot issues and arguments that the parties did not, I also believe that many times the Courts simply do not have the time or the resources to construct all of the parties' arguments for them. I believe this is particularly true in specialized areas of the law such as bankruptcy, where the Courts may not have extensive experience with the complex statutory provisions at issue. The consequence is that, while many unpublished decisions reach the correct result, they do not necessarily do so with the greatest precision. The Courts' failure to discuss a particular issue (or to discuss that issue correctly), however, may be misinterpreted not as a failing of the parties in that particular case, but rather as the "persuasive," reasoned decision of the Court.

Thus, rather than assisting in the development of a uniform body of law, I believe that the citation of unpublished decisions will actually hinder it. Instead of promoting the careful development of the law based upon carefully drafted published opinions, permitting the citation of unpublished decisions will lead to confusion and conflict.

I also believe that reliance on unpublished decisions will encourage advocates, and perhaps the Courts, to substitute quantity of citations for quality of analysis. Computer research tools have already caused some attorneys to rely on unexplained "string citations" in lieu of well-crafted advocacy. While this is fine when addressing well-established principles of law, it is not when addressing issues that have not yet been resolved by published precedent. I am very concerned that, by allowing the citation of unpublished decisions in these instances, advocates (and ultimately the Courts) will be influenced more by the quantity of unpublished decisions that reach a particular result than by analysis of the principles underlying those decisions.

The primary mission of the Courts of Appeal must be to decide the cases and controversies that are before it. Secondarily, the Courts of Appeal must, in a relatively small percentage of cases, take the time to draft well-reasoned opinions that will serve as precedent in future cases. These two functions are more than enough, in my opinion, to tax fully the limited resources of our Courts. If, in addition to these responsibilities, the Courts of Appeal must be concerned that everything they write can, and will, someday be cited to or by another Court as "persuasive," I fear that the Courts of Appeal will have no choice but to devote more time to explaining their unpublished dispositions, at the expense of the Courts' other responsibilities. By this, I am not predicting some great cataclysm in which the Courts of Appeal will grind to a halt. Rather, I am predicting something worse – a situation where, quite subtly and over time, the quality of appellate decisionmaking as embodied in a relatively small amount of well-reasoned published opinions will be replaced by reliance upon scores of quickly drafted unpublished memoranda – quantity over quality.

Reliance Upon Unpublished Decisions Will Unfairly Advantage Institutional Litigants.

The Federal Courts of Appeal have published nearly seventy linear feet of opinions during the last ten years. The other Federal Courts together have been even more prodigious. There is, in short, a lot of law out there.

Proposed Rule 32.1 will, in essence, increase by 400% the number of appellate decisions that are available for citation. This dramatic increase will unfairly advantage those institutional litigants and large law firms that have the incentive, and resources, to use this additional authority to their advantage. The burden will fall upon individuals, and their attorneys, who will face the Hobsons Choice of either (i) expending enormous costs to assemble, and master, the unpublished works of the Courts of Appeals (a choice that will not be available to many without the financial means to pay for it), or (ii) forgoing the benefits of being able to cite unpublished decisions as "persuasive" authority.

Advances in technology unquestionably have made it easier for all parties and their attorneys to *access* legal authorities. Technology, however, has not necessarily made it any easier for attorneys to *understand and use* these authorities. It is of no use for an attorney to download hundreds of decisions on the computer if the attorney does not have the time to read them and analyze their relevance to the issues at hand.

Institutional litigants, on the other hand, will have the incentive and resources to assign attorneys to review every unpublished decision in areas of the law that are of interest to them. In my area of practice, for example, lenders routinely litigate the same issues (i.e., relief from the automatic stay, objections to the debtor's discharge). They can, and will, develop private databases of unpublished cases to use to their advantage (i.e., stay relief decisions involving cases in which the debtor has no equity in an automobile). Although research services such as LEXIS and Westlaw may similarly develop databases, my experience (particularly in the specialized area of bankruptcy) is that such services are not able to target key issues in the same manner that institutional litigants can. Moreover, even if research services make tens of thousands of

unpublished decisions available "on line," most litigants and their counsel will not be able to compete with large institutional litigants in transforming this massive database into effective legal advocacy.

There Is No Need For A National Rule On This Issue.

The primary reason for adopting a national procedural rule is because there is a need for national uniformity in a particular area. In this instance, however, no such need exists. Thus, even if the Appellate Rules Advisory Committee believes that parties should be allowed to cite unpublished decisions, that choice ultimately should be left to the individual Courts of Appeal to assess what impact such a rule may have on practice in their respective Circuits.

The Ninth Circuit Court of Appeals has operated for some time under a clear and comprehensive set of rules governing both when opinions should be left unpublished, and when parties may cite to such opinions. In my more than twelve years of practice in the Ninth Circuit, I have never experienced a problem with these rules. Nor, until Rule 32.1 was proposed, was I aware of any serious controversy surrounding these rules.

Without question, certain local rules and procedures may be "traps for the unwary" or prejudice those who are not familiar with local practice. In those instances, adoption of a national rule may be highly beneficial to litigants and the Courts. The Ninth Circuit's rules respecting unpublished decisions, however, do not fall within this category. I believe that both LEXIS and Westlaw include a statement of the Ninth Circuit's citation rules at the top of every unpublished decision available on line. The same, I believe, is true with respect to unpublished decisions of other Circuits that have established citation rules.

Thus, I do not believe there is any need for a national rule, even if one otherwise disagrees with the local rules in the various Circuits that restrict citation of unpublished decisions. Rather, this matter should continue to be addressed at the Circuit level.

Thank you for the opportunity to comment on proposed Rule 32.1.

Sincerely,

K. John Shaffer