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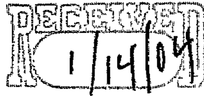

January 8, 2004

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03-AP-113

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 Federal Rule of Appellate Procedure 32.1*

Dear Mr. McCabe:

I am writing to oppose adoption of proposed Federal Rule of Appellate Procedure 32.1, which would override the rules adopted by individual circuit courts governing the citation of unpublished opinions. As a lawyer who appears regularly before the Ninth Circuit, I wanted to offer the perspective of someone who practices in a circuit of that size. In my view, the burdens Rule 32.1 would impose on practitioners like myself are substantial and unwarranted.

The Ninth Circuit, like several other circuits in the country, generally forbids the citation of unpublished opinions. For those of us who practice in a circuit as large as the Ninth, that rule is a blessing. Like many of my colleagues, I try to stay on top of Ninth Circuit law by reading the published opinions (or at least summaries of them) as they come out. As it is, that is a daunting and time-consuming task given the more than 700 published opinions the Ninth Circuit issues every year. If practitioners were free to cite unpublished opinions as sources of authority, it would be incumbent upon us to stay abreast of *all* of the Ninth Circuit's decisions, published and unpublished alike. That would be an impossible task, given the many thousands of unpublished opinions the circuit annually issues.

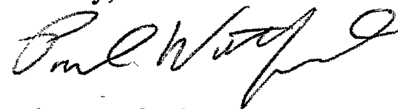
If proposed Rule 32.1 were adopted, the burdens imposed upon practitioners attempting to research Ninth Circuit law on any given subject would be enormous as well. For one thing, it would not be easy to find unpublished decisions potentially relevant to the arguments a client seeks to advance or rebut. Currently, none of the secondary sources one would ordinarily turn to for assistance – such as digests, treatises, and the like – makes any effort to catalogue and discuss unpublished opinions. The only feasible way to search for relevant unpublished decisions would

be online, most likely through Westlaw or Lexis. But that can involve many tedious (and expensive) hours spent scrolling through decisions which are frequently ambiguous or difficult to decipher, either because the opinion does not describe the full set of facts on which the panel's decision turned or because the opinion sets forth facts that in actuality were not necessary to the result the panel reached. Thus, after spending considerable effort to find unpublished decisions that might be on point, practitioners will inevitably be forced to spend even more time and effort arguing in briefs over whether those decisions correctly state the law or may legitimately be applied to the specific factual context at issue. It is at least highly debatable whether that additional effort and expense will materially improve the quality of justice handed out by our courts.

It is not a response to say that practitioners won't need to devote substantial resources to researching and reviewing the body of unpublished decisions, since those decisions rarely articulate new legal principles not already established in published opinions. If unpublished opinions may be relied on as authority to support a client's arguments, practitioners will owe an obligation to their clients to thoroughly research those opinions for whatever support they might provide, particularly since one's adversary will undoubtedly be doing the same. Diligent and responsible lawyers cannot simply ignore 80 percent (or more) of a circuit's decided case law and at the same time zealously represent their clients' interests.

Whatever the merits of the policy choice underlying proposed Rule 32.1, it is entirely improper to force that choice upon every circuit in the country. In large circuits, such as the Ninth, the changes imposed by the proposed rule would prove extraordinarily burdensome for practitioners and result in very little, if any, countervailing benefit. The assessment of whether imposition of those burdens is warranted should be made at the circuit level, not dictated by national fiat.

Sincerely,



Paul J. Watford

PJW:mb2