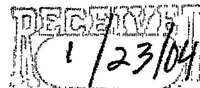
03-AP-139 

Nobody <nobody@uscbgov.ao.dcn>

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Salutation:
First: James
MI: H.
Last: Locklin
Org: Office of the Federal Public Defender
MailingAddress1: 321 East 2nd Street
MailingAddress2:
City: Los Angeles
State: California
ZIP: 90012
EmailAddress: James_Locklin@fd.org
Phone:
Fax:
Appellate: Yes
Comments:

As an attorney in the appeals unit of Federal Public Defender's Office for the Central District of California, the vast majority of my work involves briefing and arguing criminal cases in the Ninth Circuit Court of Appeals. I oppose proposed F.R.A.P. Rule 32.1, which would void the Ninth Circuit's local rule prohibiting the citation of its unpublished decisions. I practice almost exclusively in the Court of Appeals, and I strongly disagree with the Advisory Committee's conclusion that "Rule 32.1(a) will relieve attorneys of several hardships." On the contrary, I think that rule would impose significant additional burdens on appellate practitioners and would result in briefs (and ultimately opinions) that focus unduly on unpublished decisions.

The Committee Note states that "about 80% of the opinions issued by the courts of appeals in recent years have been designated as 'unpublished.'" I'm sure that the Committee will hear from appellate judges that such decisions are often drafted by law clerks and do not receive nearly the attention given to published opinions. These decisions therefore have little persuasive value, a fact acknowledged in the Committee Note. Given this, the Ninth Circuit adopted a local rule that prohibits citation to these decisions, thereby insuring that they will not distract the parties or the Court from the more valuable authority (both persuasive and precedential) applicable to a case. This is similar to a trial judge exercising his discretion under F.R.E. Rule 403 to exclude relevant evidence whose probative value is outweighed by the undue consumption of time required to consider it. But if Rule 32.1 is adopted, this other 80% of nearly valueless appellate case law (which can now be disregarded) will have to be thoroughly researched by appellate attorneys. And contrary to what the Committee suggests, there is no "incentive not to cite 'unpublished' opinions." An attorney who believes that unpublished appellate

decisions support his position will most likely cite those cases in his brief, regardless of what other authority is also cited. This will undoubtedly lead to longer briefs, which appellate judges wisely discourage.

The Committee's Note downplays the significance of the proposed rule, asserting that it "is extremely limited" because it requires only that litigants be allowed to cite unpublished decisions for whatever persuasive value they might have and does not require that those decisions be given the weight of binding precedent. Therefore, the Committee contends, unpublished decisions are no different than the "infinite variety of sources" that can be cited for their persuasive value. But there is a difference. A party might, as the Committee suggests, cite to a Shakespearian sonnet in his brief, but Shakespeare does not sit on the Court of Appeals. With unpublished decisions, however, appellate judges will be looking at their own words or the words of their colleagues, and I imagine that it would be extremely difficult for them not to give a deference to these decisions that they would not give to an opinion written by a district or state court judge, or to a professor writing a law review article. In other words, I fear that whatever the local rules might say about unpublished decisions not constituting precedent, they will take on that role in practice if Rule 32.1 is adopted.

In conclusion, Rule 32.1 would have a deleterious effect on appellate practice. If anything, the Committee should propose a rule of appellate procedure similar to the Ninth Circuit's local rule prohibiting the citation of unpublished decisions. (This would provide the national uniformity that is one of the Committee's justifications for Rule 32.1.) At a minimum, it should leave this matter to the individual Circuits to deal with as they see fit.

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