

03-AP-141

RECEIVED
1/20/04

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

FOUR EMBARCADERO CENTER
SAN FRANCISCO, CALIFORNIA 94111-4144

DIRECT DIAL
415-984-2600
DIRECT FAX
888-329-1280
EMAIL ADDRESS
TKOZLOFF@SKADDEN.COM

TEL: (415) 984-6400
FAX: (415) 984-2698
http://www.skadden.com

FIRM/AFFILIATE OFFICES

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEWARK
NEW YORK
PALO ALTO
WASHINGTON, D.C.
WILMINGTON

BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO

January 15, 2004

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

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I am writing to oppose the adoption of proposed Rule 32.1, whose adoption I believe is not in the best interest of the federal judicial system or litigants. The basis for my opposition is set forth below.

It is apparent that the care which is applied to the generation of opinions which are designated "not for publication" is substantially less than that which is employed in producing publishable opinions. Indeed, as I understand it, in most cases opinions which are designated "not for publication" are prepared entirely by judicial staff and may not even be read by the judge who is involved. Thus, while the decision made by the judge has undoubtedly been considered carefully, his explanation has not. To freight these opinions with the concept that they provide guidance to future litigants and the courts who decide their disputes seems clearly inappropriate.

Designating as "non-precedential" those opinions which are presently referred to as "non-published" while permitting them to be cited seems to be oxymoronic. If an opinion has no precedent then it is contradictory to allow it to be cited as guidance to future courts. Some have argued that this citation is intended solely to present to the court the logic of the prior opinion. If this is the case, there would seem to be no reason for citation, only for quotation.

Some have argued that prohibiting the citation to unpublished opinions disadvantages poor litigants. My sense is that the opposite is true. If the myriads of

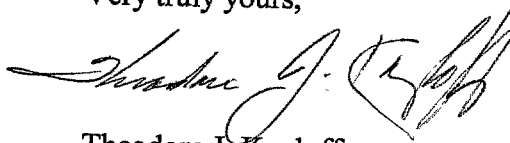
Peter G. McCabe
January 15, 2004
Page 2

unpublished opinions can be cited, then litigants with more resources at their disposal for use in conducting research will have a clear advantage over those with lesser means. Thus the inability to cite unpublished opinions evens the playing field rather than tilting it.

Finally, I believe the system is working well now. It seems inappropriate to change it under those circumstances.

I appreciate the opportunity to express my views and I hope the Commission finds them persuasive. I should note that the opinions expressed above are purely my own and are not intended to be a statement of position by Skadden, Arps.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Theodore J. Kozloff". The signature is written in dark ink and is positioned above the printed name.

Theodore J. Kozloff