03-AP-175

RECEIVED 1/26/04

"Knut S. Johnson"
<knutsj@pacbell.net>
01/26/2004 12:17 PM

To: <Rules_Comments@ao.uscourts.gov>
cc:
Subject: Proposed Rule Change (Proposed Rule 32.1 of the FRAP) (Citing Unpublished Opinions)

I am a certified criminal law specialist in San Diego California, and approximately 80% of my practice is in federal court. I have substantial experience litigating cases on appeal in the Ninth Circuit Court of Appeal, most typically for indigent clients. I am also one of the lawyer representatives to the Ninth Circuit from the Southern District of California. I have reviewed the proposed new rule change and the Committee Notes. Having done so, I strongly believe that the proposed rule is a terrible idea.

I believe that this proposed rule will have disastrous consequences for litigants, judges, and court staff. In my experience, unpublished opinions suffer from shoddy analysis and missed issues. These opinions are often obviously written by law clerks and many times have glaring mistakes in them. The courts often seem to give these opinions little thought and giving these "judicial afterthoughts" any sort of persuasive values will cause all litigants (and the deciding judges in the new case) to guess or infer what facts the judges in the unpublished opinions were relying upon. Any rule giving these "opinions" any precedential value may cause confusion and delay because some judges will probably begin to take more time in drafting unpublished decisions. That extra time will delay appeals that already take too long.

Furthermore, the pro se litigants, sole practitioners and others who don't have access to electronic research will be tremendously disadvantaged. How can imprisoned, pro se habeas petitioners ever comply with the requirement that they serve a copy of the unpublished decision? Prisoners, in my experience, seldom have access to the internet. Will their pleading be struck because they did not know how or where to obtain the copy of the unpublished decision? Also, what will sole practitioners do to cope with the thousands of new opinions (at least 80% of the opinions, according to the Committee Notes) that are not annotated in reference sources and that may be used against them?

Finally, a party is always free to use the analysis of an unreported opinion. However, giving that unpublished analysis the added persuasive weight of judicial approval makes no sense given the quality of unpublished opinions. Allowing the use of these opinions is like letting lawyers argue, "well, two or three appellate judge agree with me, although they do not think their opinion is worth publishing."

This proposed rule will only further the distance between parties with money and those without. The proposed rule will confuse litigants and make little or no difference in helping to decide cases. Finally, the proposed rule will increase the workload of judges and judicial staff to no apparent end. This committee should reject the proposed rule.

Thank you for your attention to this.

Knut S. Johnson, Esq.
1010 Second Avenue, Suite 1850

San Diego, California 92101
(619) 232-7080 (phone)
(619) 232-7324 (fax)
www.knutjohnson.com

www.knutjohnson.com