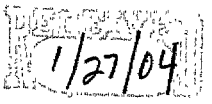

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03-AP-185

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Sent via fax to 202) 502-1755

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

Dear Mr. McCabe:

This letter is written in opposition to proposed *Federal Rules of Appellate Procedure*, Rule 32.1, which would allow the citation of unpublished opinions in appellate proceedings. While I am sure these points have been raised by others before, especially in an article written by Judges Kozinski and Reinhardt, entitled "Please Don't Cite This!," I would like to add my two cents.

From my point of view as an appellate attorney, this proposed rule would result in a substantial burden on the parties, their attorneys, and the courts, as follows:

- Every appeal requires a substantial amount of legal research. Even the most basic point can result in several citeable opinions. That workload would increase substantially if appellate attorneys were required to research both published and unpublished opinions. While appellate attorneys often look to unpublished decisions to get a feel for a judge or court's position, their review is certainly not as detailed as when they are looking at published decisions that might be cited by either side. Since Westlaw started publishing unpublished opinions on the Internet, these opinions consume a substantial part of an attorney's research. For instance, in a recent appeal, I researched a point and discovered six published opinions and 21 unpublished opinions.
- The precedential effect of a published opinion is a known factor in researching an appeal. This rule does not address the weight given unpublished decisions, leaving it to the courts to determine. The value of such unpublished decisions varies from circuit to circuit. It may even change from case to case, as the courts will be free to

reject the reasoning of unpublished opinions. This makes an appeal unpredictable and does not offer any guidance to appellate practitioners working on the appeal. As such, every unpublished opinion would have to be treated as having almost, if not the same, effect as a published opinion, thus increasing the workload in addressing the principles involved in the unpublished decision and distinguishing them from the case at hand.

- As Judges Kozinski and Reinhardt point out in their article, the workload would also be increased because an unpublished opinion written solely to dispose of an individual case will now be crafted as a published opinion. No longer will judges view their cases in a summary manner but they will be cognizant that every word they write will end up being cited in other appellate briefs. Thus, the opinions would be crafted *as if* they had precedential effect and the distinction between published opinions and a memdispo would disappear. As a result, it is likely those previously short memdispos would increase the workload. As a second point, as noted by Judges Kozinski and Reinhardt, those memdispos are often written by research attorneys and are not widely circulated among other judges. That, of course, would change, also resulting in additional work for the judges.
- It requires attorneys to subscribe to either Westlaw or Nexis and may result in a financial burden to do so, especially if the attorney is part of a law firm. While the expense may not be significant, the requirement of subscribing to Westlaw or Nexis, while other services or sources of information are available, would result in a windfall to these providers and excludes other information providers on this basis alone.

My major concerns, of course, are the unpredictability of the weight given to unpublished opinion and the increased workloads for everyone concerned. There is a reason why certain opinions are not published, and if they are not, then they should not be cited as authority.

Thank you for your consideration of this letter.

Very truly yours,

DONNA BADER

DB:wc