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03-AP-196

January 21, 2004

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 Secretary McCabe:

I oppose the proposed Federal Rule of Appellate Procedure Section 32.1. I am attorney licensed to practice in all of the Courts of the California as well as the United States Court of Appeal for the Ninth Circuit and the United States District Courts for the Central and Southern Districts of California. I commenced practicing law in 1976 and the focus of my practice continues to be real estate litigation at the trial court and appellate court levels. The proposed rule, if it became "the rule", would increase the expense of litigation, make the practice of law much more difficult, and would increase tremendously the existing burdens on both the judges of the inferior and appellate courts. I encourage the Committee to keep the status quo and reject the proposed rule.

I have carefully reviewed the Advisory Committee Notes, various law review articles and legal commentaries (by both attorneys and judges), regarding the citation by attorneys in their briefs of unpublished opinions and the general consensus is that a substantial majority of attorneys, and judges, support keeping the *status quo* and reject the suggestion that unpublished opinions be citable by either the parties to an appeal (or at the lower court level), or by the court. The 9th Circuit, in particular, is specific, to wit: "Unpublished dispositions and orders of this Court may not be cited . . . ." 9th Cir. R. 36-3.

I have never sat as a judge (although I am an arbitrator/mediator). I know, however, that there is a inclination by a judge to follow the guidance of a higher court (i.e. a Court of Appeal decision). If the tendency of a judge is to "look higher" for assistance in deciding a case, or an issue, the judge's search should be limited to those instructive decisions that have been certified for publication. If the responsibility of a judge is to analyze, sort out, and select case precedent, prohibiting attorneys from suggesting to a judge that an unpublished disposition be relied upon is worthy of support. An unpublished opinion

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should remain as the law of the case in the case in which it was cited - - and not in another case. The unpublished disposition is limited in scope, is limited in its precedence, and the Committee's suggestions that unpublished opinions have "persuasive value" belies the fact that unpublished dispositions are not usually written by the panel of three judges. See, Alex Kozinski & Stephen Reinhardt, Please Don't Cite This!, Cal. Law., June 2000, at 43, 44.

In 1978, about two years out of law school, I improperly did cite a case to a Superior Court Judge that had been depublished. The problem that I had was that the case I cited had been depublished *after* I had cited it. Opposing counsel loved that one. With an apology to the court, and opposing counsel, I lived through the issue and learned through experience to not let that happen again. With computer and Internet research now available, I am the first one to be certain that a case I cite, both before and after placing same in a brief submitted to a court, is citable, has not been depublished, and I too am quick to advise opposing counsel when they "slipped" and cited something that (1) is not citable or that has (2) been depublished.

The burden placed on a practicing attorney in today's hunt for legal support of a position asserted on behalf of a client is already extreme. If all cases become citable authority, that burden will increase as an attorney who does *not* read all the cases to determine their applicability to their client's case, may commit malpractice, let alone violate the rules of professional responsibility by failing to fully research and analyze "citable" dispositions. The cost to litigate a claim is unbelievably high without the ability to cite unpublished dispositions. I can only imagine what the cost will be if a practicing attorney must wade through the slosh of existing and future unpublished decisions.

I do not know if I am a voice of one, or one of many. I do know, however, that if the proposed rule is adopted, the practice of advocacy, both at the trial and appellate levels, will drastically change. The proposed rule, and the Committee's suggestions, do not consider the needs of the day to day attorney in the trenches; the litigant who does not have a ton of money to litigate a legal issue; the additional burdens placed upon the judiciary that is already overburdened; and, finally, the fact that "if it ain't broken", why fix it?

I trust that this matter will be seriously considered by the Committee and I urge it to reject the proposed rule and maintain the *status quo*.

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