

RECEIVED  
2/2/04

03-AP-  
244

ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN

ATTORNEYS AT LAW

177 POST STREET, SUITE 300  
SAN FRANCISCO, CALIFORNIA 94108

(415) 421-7151

FAX (415) 362-8064

www.alshulerberzon.com

ADAM B. WOLF  
FELLOW

FRED H. ALTSHULER  
STEPHEN P. BERZON  
BARBARA J. CHISHOLM  
JEFFREY B. DEMAIN  
REBEKAH B. EVENSON  
EILEEN B. GOLDSMITH  
LAURA F. JURAN  
SCOTT A. KRONLAND  
DOROTHEA K. LANGSAM  
DANIELLE E. LEONARD  
STACEY M. LEYFON  
LINDA LYE  
PETER D. NUSSBAUM  
DANIEL T. PURTELL  
MICHAEL RUBIN  
JONATHAN WEISSGLASS

February 2, 2004

VIA FACSIMILE & U.S. MAIL

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  
Fax: 202/502-1755

RE: Proposed Federal Rule of Appellate Procedure 32.1  
(Citation of unpublished opinions)

Dear Mr. McCabe:

As an attorney who has practiced in federal and state courts in California for more than 30 years, I write in opposition to proposed Federal Rule of Appellate Procedure Rule 32.1, which would permit lawyers and courts in the Ninth Circuit to cite unpublished Ninth Circuit opinions.

For decades California state courts have barred the citation of unpublished appellate opinions. Rule 977(a) of the California Rules of Courts provides as follows:

An opinion of a Court of Appeal or an appellate department of the Superior Court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding, except as provided in subdivision (b).

Subdivision (b) of Rule 977 permits the citation of unpublished opinions when they are relevant under the doctrines of the law of the case, res judicata or collateral estoppel, or when the opinion is relevant to a criminal or disciplinary action because it states reason for a decision affecting the same defendant or respondent in another action or proceeding.

Peter G. McCabe  
February 2, 2004  
Page 2

Over the years I have read hundreds of published and unpublished California Court of Appeal opinions. There is a world of difference between the two in their depth of reasoning and thoroughness of analysis. Unpublished opinions often presuppose that the reader is familiar with the facts of the case and the parties' legal arguments. A reader of an unpublished opinion who did not know this underlying context could easily misconstrue how the appellate court would rule in future cases.

California Rule of Court 997(a) has provided a workable means of allowing the California Courts of Appeal to explain a ruling to the parties and the lower court without the expending the time and resources necessary to draft an opinion that would stand as a precedent. I am concerned that if the federal Courts of Appeals were required to publish their opinions in all cases, they might revert to the practice in some jurisdictions of disposing of a case by a simple order of "affirmed" or "reversed." That would disserve the interests of all concerned.

Very truly yours,



Fred H. Altshuler

FHA:tym