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03-AP-267

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RE: Proposed Federal Rule of Appellate Procedure 32.1 (Citation of unpublished opinions)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

I wish to express my opposition to proposed Federal Rule of Appellate Procedure 32.1. By way of background, I am a partner in a small San Francisco law firm that specializes in federal civil litigation, both at the trial and appellate levels. Since 1969, I have litigated hundreds of major cases, the great majority in courts located in the Ninth Circuit.

Based on this experience, I urge the Committee not to adopt proposed Rule 32.1 for two separate reasons. First, I believe the unintended consequence will be to affect adversely the way district courts decide cases. And second, the proposed rule will unnecessarily make litigation in the district courts even more expensive and resource-intensive than it already is.

A. The problem is not so much that in future appellate cases, a court of appeals panel will rely upon or be influenced by an unpublished memorandum disposition issued in an earlier case. Court of appeals judges are obviously familiar with the manner in which unpublished memorandum dispositions are prepared and presumably have internalized the understanding that such dispositions will not be utilized in deciding subsequent cases.

This is not necessarily the case in the district courts. District judges in the current era

have an extremely busy docket. In many districts, weekly "motion days" involve researching, deciding and issuing written decisions on a dozen or more contested legal issues. Other days are spent not only in working on such motions, but in trial, temporary restraining order or preliminary injunction hearings, case management conferences, pre-trial conferences, criminal sentencing, managing discovery and the like. Given that schedule, there is too great a likelihood that when presented with an unpublished case in which three court of appeals judges have taken a position on an issue before the court, the district court will follow the path of least resistance and rule in a similar fashion, rather than undertaking an independent analysis and explaining why it has chosen to take a different view. But, in issuing an unpublished decision, the court of appeals did not intend its decision to have this effect.

I recognize that, even without the proposed rule, a district court can of course read an "unpublished" opinion in Westlaw on its own and use it as a prognostication of how the court of appeals would likely treat the case. But it is far less likely that an unpublished disposition will take on "a life of its own" when it is not discussed in the parties' briefs, not raised at oral argument, and the district judge does not have to publicly distinguish or reject it.

The proposed rule is thus likely to generate one of two unintended consequences. The rule may lead courts of appeals to decide the numerous cases in which the parties otherwise would have received a reasoned, albeit unpublished, disposition with a one word decision: "affirmed" or "reversed." Or the rule may slow the development of legal doctrine. Many important appellate decisions have had their genesis in the district courts. This can only be accomplished when the district court is writing on a clean slate within its own circuit. That should certainly be the case when the court of appeals has expressed its intent that a particular disposition not be utilized in other cases.

B. I am also concerned that the proposed rule will unnecessarily add to the time and expense of litigating cases in the federal courts. This is no small matter. Over the past 30 years, as a result of numerous, separate changes in the Federal Rules of Civil Procedure, Local Rules, and Standing Orders of individual judges -- e.g., requiring multi-case management conferences, case management statements (often required to be negotiated and jointly agreed to by multiple parties), multi-meet and confer requirements, settlement conferences and mandatory ADR, multi-tiered discovery, extended periods for briefing motions -- the time and consequent expense required to litigate in the federal district courts has mushroomed. At this juncture, it has become increasingly difficult for a client to litigate in federal court without either a very deep pocket or a public interest attorney.

This rule will only make matters worse. An attorney will have no choice but to spend considerable time researching the thousands of unpublished dispositions annually and then

attempting to use them in its favor in district court briefs and arguments. This will of course require the responding party to attempt to distinguish each of these cases and come up with unpublished dispositions of its own. Even if a moving party declines to fire the first shot, that party will have no choice but to respond in kind in its reply brief, thus necessitating the research and analysis in any event. This kind of "arms race" in the district court was certainly not the intent of the courts of appeals in attempting to provide parties with written reasons -- albeit unpublished -- for its dispositions, rather than a simple "affirmed" or "reversed".

While imperfect, there has been no showing that the present scheme which relies on the courts of appeals to establish their own rules regarding the use of unpublished decisions is broken. Given the problems that may well be caused by the proposed "fix", I urge the committee not to adopt Rule 32.1.

Sincerely,

Stephen P. Berzon

SPB:tym