Court of Appeal

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CHAMBERS OF
WILLIAM W. BEDSWORTH
ASSOCIATE JUSTICE

January 28, 2004

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Proposed FRAP 32.1

Dear Mr. McCabe:

We understand the Advisory Committee on Rules of Practice and Procedure is considering an amendment to the Federal Rules of Appellate Procedure that would add a new Rule 32.1, allowing citation of opinions previously designated uncitable. We write to express our opinion that such a rule would be ill-advised and counter-productive.

We are not in the practice of commenting on federal rules, and we've discerned no indication that the federal courts are in need of our help. But what affects the federal courts which overlay our state court system will eventually – directly or indirectly – effect us. So we feel we would be remiss if we did not at least offer our thoughts on the matter.

Since similar legislation was before the California Legislature last year, we have had occasion to consider it at some length. Our state has long distinguished between precedential "published" opinions and non-precedential "unpublished" opinions. Since even the unpublished opinions now appear on the internet, that term is of

questionable currency, but our state's judges were successful in convincing our legislature their availability on the web should not transmogrify them into citable authority.

Our colleague William F. Rylaarsdam, who also feels strongly about this matter, has already written you, outlining the opposition of the California judiciary to such a rule, obviating a full catalogue of the problems it would present. We fully concur with those points and adopt them.

Additionally, we are convinced the law should be viewed as a tool, much like a pencil. If you put too fine a point on a pencil, it breaks and cannot function as a tool until more time is spent sharpening it. You are much better off with a slightly duller point: you can write with it just as clearly, and it is not as fragile.

We feel allowing all opinions by all appellate courts in a jurisdiction to be cited puts too fine a point on the law. If there are 50 retrievable opinions on a question, one side will cite 30 of them and the other side will cite 30 (there will be at least ten opinions both sides think support them) and the trial judge will be expected somehow to hack through this thicket – usually during an evening; sometimes during a lunch break. But whether the time available is an hour or a week, the task is unmanageable.

Or – worse – one side will cite an obscure analysis of the point at issue which has never been reviewed, never been subjected to consideration by any but the panel who wrote it, and offer it as authority against time-honored published cases which have been considered every time the issue has come up, cases which have stood the test of time and attacks by everyone who has been on the other side since their publication. And that judge will be asked to reject the collective wisdom of the entire state's bench and bar in favor of what looks like an attractive analysis of arguably more similar facts.

All of the signatories to this letter have been trial judges, and we consider these nightmare scenarios for a trial judge.

And the effect on the bar is corrosive. Instead of looking for a case analogous to their own and closely analyzing the legal reasoning of that opinion, their approach will – over time – devolve to a simple process of finding an opinion with

arguably identical facts and simply parroting the appellate court's reasoning in that case. They will become expert in computer research and deficient in legal acumen. And when the court asks about the significance of whatever differences there are between the cited case and the one at hand, their ability to respond with anything more cogent than an insistence that the similarity of the facts should control will be diminished.

The law and the parties are much better served by a system in which there are a limited number of opinions available to cite. The bench officer confronted with those authorities can then choose those considered closest to the instant matter on the significant facts and apply his/her presumably considerable cognitive and ratiocinative powers to them.

After all, these people have been chosen for a career on the bench; they should be excellent lawyers. If they're on the federal bench, they should be outstanding lawyers. Nothing in our reversal rates suggests they are having trouble getting cases right. We should rely on their ability to extrapolate the rule of their case from the rules of a limited number of reported decisions.

We think that process is more apt to promote justice than a surfeit of highly billable computer research combined with the judicial equivalent of "Which two pictures are the same?" We were able to convince our legislature of this, and thereby preserved the binary system of published and unpublished cases in California. While it may be that a different system might work elsewhere, the size of our jurisdiction and the volume of appellate decisions, seems to us to require it here, and to require it in the Ninth Circuit as well.

We respectfully urge the Advisory Committee to reject proposed FRAP 32.1.

Yours truly,

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