ADVISORY COUNCIL
OF THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
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03-AP-410

February 16, 2004

By Facsimile and Messenger

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

Re: Opposition to Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

The Advisory Council to the Court of Appeals for the Federal Circuit strongly and unanimously opposes the adoption of proposed Federal Rule of Appellate Procedure 32.1. As explained in more detail below, the proposed rule, which would allow the citation of nonprecedential dispositions before the United States Courts of Appeals, would adversely affect the administration of justice by, *inter alia*, causing the misallocation of judicial resources, delaying issuance of precedential opinions, increasing the likelihood that judgments will be issued without an accompanying opinion, and otherwise burdening litigants unnecessarily with, for example, additional (and unfruitful) research. At a minimum, we believe that the decision of whether nonprecedential opinions may be cited (by courts and litigants) should be left to the sound discretion of each circuit court as provided for in their respective local rules.

If implemented, proposed Rule 32.1 will cause the Courts of Appeals to misallocate their already scarce resources. The Federal

Circuit currently designates certain opinions as nonprecedential because of its large, and very complex, caseload, which includes some of the most difficult cases (*e.g.*, patent appeals) heard by the Courts of Appeals, and because it simply is not possible to issue a precedential opinion in every appeal. Moreover, because some of the issues are subject to *de novo* review, it is not at all uncommon that the decision in those cases is inherently fact-bound. This reduces dramatically the precedential value of such decisions. Significantly, the practice of issuing nonprecedential opinions permits the Judges of the Federal Circuit to focus their efforts on writing authoritative and comprehensive opinions in important and precedent-setting cases. These precedential opinions, which require a great deal of effort, careful consideration, close attention to the precise wording of the opinions and detailed research, provide crucial and binding guidance on broader issues of law to the lower tribunals and agencies from which the Federal Circuit hears appeals. Nonprecedential opinions do not require the same amount of time or effort because they do not constitute binding precedent and, therefore, can be prepared more quickly without concern about their impact on future cases. Ordinarily, they are relatively short because they are written for the parties (who already know the relevant facts), provide only an abbreviated review of such facts and the law, and provide prompt disposition of cases while briefly explaining the Court's ratio nale. In short, nonprecedential opinions do not contain new legal principles and add little, if any, clarity to the body of the law.[1]

Furthermore, proposed Rule 32.1 would have the undesirable effect of retroactively permitting citation of nonprecedential opinions previously issued by the Federal Circuit, and other Courts of Appeals, despite the previous rules in some of the circuits barring their citation. As discussed above, such nonprecedential opinions were not prepared with the same degree of care and consideration for their impact on future cases as citable authority. As a result, "morp hing" these opinions into citable precedent was never intended by certain of the circuits in which they were issued. This conversion could have unforeseen effects on the development of the law when zealous advocates seek to extend the application of nonprecedential opinions to different factual situations. Because the extensive body of non-precedential opinions previously issued by the Courts of Appeals cannot be corrected to rectify this problem, particular care should be taken to avoid the detrimental retroactive application of any new rule.

Although the Advisory Committee on Appellate Rules believes that the proposed rule will not affect the allocation of judicial resources because each circuit may determine by local

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[1] Pursuant to Federal Circuit Rule 47.6(c), within 60 days of the issuance of a nonprecedential opinion, any person (and not just the parties) may request that the Federal Circuit re-issue the opinion in precedential form.

rule that nonprecedential opinions do not constitute binding precedent, we respectfully believe that the Advisory Committee is incorrect. We are convinced that the Judges of the Courts of Appeals will devote more of their scarce time and resources to the writing of nonprecedential opinions if they may be cited and relied upon by both litigants and lower tribunals. Even if a local rule states that such opinions are not binding, litigants and lower tribunals will naturally believe that statements by three circuit judges are deserving of significant weight when, in fact, nonprecedential opinions are deserving of no weight.

When the Judges inevitably devote more time to the writing of nonprecedential opinions, this will cause one or more, and most likely all, of the following to occur: (1) delay in the issuance of nonprecedential opinions, (2) delay in the issuance of, and/or the devotion of less time to, precedential opinions, and (3) an increase in the issuance of judgments without an opinion. Based on our experience, all three of these outcomes are unwarranted and should not be promoted without a compelling benefit, which has not been demonstrated.[2]

Finally, we believe the proposed rule will also negatively affect litigants because their counsel will feel compelled, and perhaps will be compelled by ethics rules, to expand significantly the scope of their research to include nonprecedential opinions. Such expanded research will significantly increase litigation costs with no benefit to the litigants. (In this regard, we note that the Federal Circuit has issued many thousands of nonprecedential opinions since its inception in October 1982.) In addition, nonprecedential opinions are harder, and often more expensive, to locate than precedential opinions. As a result, the proposed rule would favor litigants with greater resources and impose significant disadvantages on poor litigants not only through increased costs but also because of resulting

[2] An increase in the number of appeals resolved without an opinion is highly undesirable because the current practice of issuing nonprecedential opinions, at a minimum, provides individual appellants, who often are appealing issues of great concern to the particular individual but not of general interest to the development of the law, a sense that justice has been done. Even if they lose, because these individuals receive an explanation of the Court' s rationale, they are assured that their issues have been considered and resolved at a high level. As a result, a decrease in the number of nonprecedential opinions accompanied by an increase in the number of affirmances without an opinion will not serve the administration of justice and will create the perception that those appeals were not adequately considered.

delays in the issuance of opinions that would, in some cases, include monetary awards or other relief.

Thank you for your time and consideration of these comments.

Respectfully submitted,

Carter Phillips

Carter Phillips
Chairman
Advisory Council of the
Court of Appeals for the Federal Circuit