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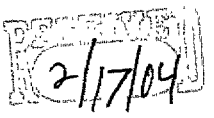

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VIA FEDERAL EXPRESS

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Sir:

I write in opposition to proposed Federal Rule of Appellate Procedure 32.1, which would override circuit rules that bar citation in most instances to unpublished memorandum decisions of the courts of appeals. Based upon my experience as a judicial law clerk, a practicing appellate lawyer, and the library administrator for my law office, I believe that allowing citation to unpublished decisions would be contrary to the best interests of the courts, the bar, the public, and the orderly development of legal principles.

It is appropriate to lay out at the beginning the experience that I bring to bear on this question. After graduating from Harvard Law School in 1986, I practiced commercial litigation for a year in Phoenix, Arizona, and then served as law clerk to a Ninth Circuit judge. I returned to private practice in civil trial and appellate litigation in Phoenix, and for the last five years have emphasized appellate advocacy, including before the Ninth Circuit (which prohibits citation to unpublished decisions for most purposes) and the Tenth Circuit (which disfavors but permits citation to such decisions). I am also the lead author of *The Arizona Trial Handbook* (Thomson*West 2003-2004), and in the capacity I review all published decisions of the Arizona courts.

In addition, for the last eleven years, I have been responsible for the administration of the library in my office, which has grown from fourteen to sixty lawyers. Because I am both a practicing lawyer and a library administrator, I was asked by West Group to serve at its annual meeting on a panel on the future of legal research; the panel's discussion, which was moderated by Professor Arthur Miller of Harvard Law School, focused in part on approaches to unpublished decisions. In addition, as a member of the American Bar Association's Council of Appellate Lawyers, I have been involved in a number of

programs in which the citability of unpublished decisions has been vigorously debated. I have looked at the problem of unpublished decisions from several perspectives, and have concluded that, from each perspective, allowing citation would be unproductive.

A. The Chambers' Perspective

It was clear from my experience as a Ninth Circuit law clerk, both from my own work and from observing the work of judges and clerks in other chambers, that allowing citation would dramatically affect the way courts would be compelled to announce their decisions. While the unpublished nature of decision did not affect the care that was taken in *deciding* the case, it very much did affect the care that was taken in formally *expressing* the decision. Published opinions are labored over, to ensure that the facts are fully and accurately set forth so that the public can understand the relevant details that inform the application of the law, and the legal analysis is explained so that those who do not have access to the briefs can understand the parties' contentions, the precedent that has been considered, and the nuances of reasoning that led to the court's decision. This involves an extraordinary amount of wordsmithing by the writing judge, and frequently includes much refinement through the participation of the other members of the panel.

By contrast, unpublished memoranda are almost always drafted by law clerks and only lightly edited by the judges. Unless they are warmed-over versions of bench memos, they are usually written in a kind of shorthand that the parties would understand because they are familiar with the facts and legal arguments presented. The public, by contrast, would not have the ability to understand what the court was actually deciding and why. In addition, there are times when the panel members agree on the result, but disagree on the precise means of reaching that result. Because the bottom line of the unpublished decision may well be the only important aspect for the parties, the panel members may choose not to fight out the rationale for the decision to the same extent that they would if the opinion was to have precedential effect.

A second major distinction arises with respect to the courts' review of decisions through the en banc process. A number of judges and law clerks review all published opinions of their circuits in an effort to familiarize themselves with the developing precedent and police the opinions for erroneous panel decisions that need to be addressed by the larger court. In a circuit as large as the Ninth Circuit, the volume of published opinions is large and daunting for even the most diligent reader. The pile of unpublished memorandum decisions is even larger, however, and I knew of no one who reviewed them *sua sponte* because, even if they were erroneous, they would not affect the development of the law.

It would be completely impossible for the already overburdened judges and law clerks to draft, refine, and review *all* dispositions with the same effort that is currently expended on published opinions. And the bulk of cases, whether criminal or civil appeals, simply do not warrant such effort: they do not raise novel questions of law or even interesting factual circumstances for the application of settled law.

Allowing citation to unpublished decisions would leave judges and their clerks caught between a rock and a hard place. On the one hand, they could spend more time on unpublished decisions in order

to make the analysis more comprehensible, lest the now-citable decisions be misconstrued by nonparties or other courts. That time would have to be taken from either the refinement of published opinions or sleeping hours. The equally undesirable alternative would be for panels to issue extremely cryptic decisions that even the parties would not fully understand, or even one-line decisions that could not possibly be misused or misunderstood, e.g., "Affirmed for the reasons stated below." This would hardly assist the parties or the lower courts on remand in handling the particular case being decided.

Such a development would also make it more difficult to prepare petitions for certiorari to the United States Supreme Court. In a recent case in which the Ninth Circuit ruled against my client in an unpublished decision, my co-counsel and I were successful in obtaining a grant of certiorari and reversal on the merits. That was possible only because the Ninth Circuit's memorandum decision was sufficiently detailed to make the relevant facts and legal analysis clear for the Supreme Court, which also had the benefit of the parties' briefs. If the decision had been more cryptic or perfunctory, obtaining review would have been exceedingly unlikely.

B. The Practicing Lawyers' Perspective

Unpublished decisions are virtually useless for any legitimate purpose, and every lawyer knows it. Regardless of the court, they are usually not carefully written, and are sufficiently oblique that one cannot be sure what was going on in the case. Lawyers like being able to cite them for precisely that reason; they are often a gold mine of propositions of law phrased in broad, unqualified ways that were never meant to provide guidance for later courts.

No one knows what to do with unpublished circuit decisions. Even in circuits that allow citation, such as the Tenth Circuit, they represent a limbo of pseudo-precedent that is not binding but yet has more effect than merely legal advocacy. The respect they are given varies from near zero to that given binding precedent; they may be treated like a law review article, a Federal Supplement decision from another circuit, or a published opinion of the authoring court itself. Anyone who states that lawyers and judges have a common understanding of how to handle unpublished decisions is either misinformed or less than candid.

Concern that undue consideration may be given to precedent that the judges did not even want to publish has led Arizona state courts to expand the ban on citing unpublished *appellate* decisions to a similar ban on citing unpublished *trial court* decisions. Arizona's citation rule, much like that of many federal courts, differentiates between published appellate opinions and unpublished appellate memorandum decisions, and prohibits the citation of the latter for any purpose other than collateral estoppel, res judicata, law of the case, or seeking publication or further review of that or another decision. In *Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n.3, 701 P.2d 1182, 1185 n.3 (1985), however, the Arizona Supreme Court extended the rule to prohibit citation to unpublished federal district court decisions, and that principle was extended by later cases to unpublished state trial court decisions. In the West Group panel discussion mentioned above, former Arizona Supreme Court Chief Justice Stanley Feldman defended this rule on the ground that unpublished decisions were of such low quality that they provided unreliable guidance to other courts. That is a sensible approach.

From a practicing lawyer's perspective, if an unpublished decision would be a truly valuable contribution to the developing law, it is more productive simply to ask the court to publish the decision. On several occasions, I have made such requests to both federal and state courts, and have been successful about half the time. In doing so, I have carefully considered and explained to the courts that the decisions contained a sufficient factual recitation and legal analysis to make them useful and not misleading. That simply cannot be said of most unpublished decisions. While courts have at times denied my requests, I respect the judges' gatekeeping function in maintaining the quality of precedent.

To the extent that unpublished decisions have any value in advising clients as to where the law might be headed, in contemplating various factual situations, or in providing intelligence about particular judges' dispositions on specific issues, they are certainly available for that purpose. That does not warrant allowing them to be cited in court.

C. The Librarians' Perspective

If one thing is certain, it is that allowing citation to unpublished decisions increases the cost of research and briefing for parties and lawyers. These decisions were not until recently digested, and they are rarely if ever analyzed by treatises. They exist primarily in proprietary computer databases where, unlike published opinions, they are available only for a price. And that price can be exceedingly high, both for locating and then printing the decision.

This creates an uneven playing field for litigants and lawyers. Those who have more money, or who have lawyers with advantageous contracts with Westlaw, Lexis, or other providers, have a distinct advantage in locating decisions. This has not been changed by West Group's introduction in September 2001 of the Federal Appendix, which "publishes" unpublished decisions from federal circuits. Few academic or court libraries, and even fewer law firm libraries, have chosen to subscribe to the Federal Appendix. Harvard Law School has it, but Arizona State University College of Law does not. The set is both expensive and voluminous; as the cost of office space climbs, firms are forced to cut back on their reporter sets, not expand them for the sake of volumes filled with decisions of questionable value. Computer databases remain the only practical source for unpublished decisions.

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In conclusion, little good and much mischief would flow from the adoption of proposed Rule 32.1. The legal world is already overflowing with shelf after shelf of decisions intended to be citable precedent. The published opinions, however, are the cream of the crop, the tip of the iceberg. They should not lessened—or indeed overrun—by an even larger body of unpublished precedent of dubious meaning and quality. It would be better for all concerned to leave each circuit to make its own judgment based on its own internal practices and culture. If a uniform rule is absolutely necessary, it should be that unpublished decisions are not citable *anywhere*; each court can then simply decide to publish more or less, as it sees fit.

I appreciate the opportunity to offer these comments on proposed Rule 32.1. This is no doubt a controversial subject, but the federal courts should not rush to open Pandora's box based on recommendations from members of the bar who may be more concerned with finding ammunition for their briefs than with seeing that the courts function properly, that all parties have a fair opportunity, and, most importantly, that the law develops deliberately and coherently.

Sincerely yours,

Bennett Evan Cooper

BEC:skg