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February 16, 2004

Via E-mail: Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed FRAP Rule 32.1

Dear Mr. McCabe:

I am a partner in my firm's appellate law and strategy group and have focused on appellate law since I entered private practice in 1996. I have had ample opportunity to consider the usefulness of such opinions to practitioners and I write to oppose the proposed rule permitting citation to unpublished opinions.

One does not need to be a judge or a clerk to know that the Ninth Circuit Court of Appeals handles an overwhelming caseload and publish only a small percent of their opinions. Time simply does not permit judges to draft every decision with the care and precision required of cases that will be studied by other courts and lawyers for their precedential effect. Accordingly, cases that do not present difficult or new issues are written merely to inform the parties of the grounds for the panel's decision in their case. The facts are generally omitted, as are the arguments pressed by each side. Without this context, which is known only to the panel and the parties, it is difficult for an outsider reviewing the opinion to know just why and how a decision was reached. If such opinions become citable – even if only for their “persuasive” effect – they are likely to be a source of confusion at best and fodder for mischief at worst. Clever but disingenuous attorneys (or well-meaning but harried attorneys who do not have time to review all the case law) will inevitably use loose language from such opinions to misstate the law.

As a result, the proposed rule will impose overwhelming costs on the courts and on litigants. Even if unpublished opinions are given merely persuasive value, lawyers will have to wade through the sea of unpublished opinions relevant to their clients' cases to be sure they have “covered all the bases” and to prepare for potential arguments based on these opinions. We will also have to spend time (and limited brief space) explaining to the court why statements in

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unpublished opinions cited by opposing counsel – invariably taken out of context because the opinions do not provide context – are misleading and should not be used to decide a case. The hours we will have to spend combing through these decisions will raise the already high price of legal representation, and put litigants with limited budgets at a decided disadvantage. Even corporate litigants with substantial legal budgets will balk at increased billing and question the necessity of doing all the research and analysis the proposed rule will require, leading some lawyers to take shortcuts that will do nothing to improve the quality of their briefing.

I suspect that if the proposed rule is adopted, cases that are now treated as unpublished dispositions will be replaced with one-word orders indicating affirmance or reversal. While this will save us all from being buried in a sea of paper and a growing judicial backlog, it will not assist the affected parties or allow observers to keep track of frequently recurring issues.

The Advisory Committee note provides only one reason for a uniform rule: namely, that “conflicting rules [regarding citation of unpublished opinions] have created a hardship for practitioners, especially those who practice in more than one circuit.” Advisory Committee Note at 34. As a lawyer who regularly practices in many states and circuits, I do not find this reason compelling. I have never found it any more difficult to keep track of conflicting rules regarding citation of unpublished opinions than it is to keep track of myriad other local rules and practices.

Nor do I believe, as some proponents of the rule change argue, that being unable to cite an unpublished opinion impinges on my free speech rights or those of my clients. If an unpublished opinion suggests a good argument that could be made in my case, I am free to make that argument, citing to the same published case that the opinion did.

For the foregoing reasons, I urge the Committee not to adopt the proposed rule.

Sincerely,

L. Rachel Helyar

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bcc: Alex Kozinski