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02/16/2004 10:41 PM

To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Comment in Opposition to Rule 32.1

03-AP-458

I attach a letter expressing my personal opposition to Rule 32.1. Thank you for your consideration of these comments.

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Engel Rule 32.1 letter.do

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February 16, 2004

VIA E-MAIL AND REGULAR 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

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I write to express my strong opposition to the proposed Federal Rule of Appellate Procedure 32.1. As an appellate lawyer in private practice, I have been following the debate over the rule quite closely. In light of the hundreds of letters that have expressed opposition to the rule, the cogency of the reasoning in those letters, and the fact that their authors include a veritable "Who's Who" of the federal judiciary, there is little I could add to the present discussion. The opponents have explained in great detail how the new rule would corrupt circuit law with ambiguous and misleading statements; make legal research more onerous; and further delay the disposition of appeals. Rather than reiterating these points, I would like to just repeat what these comments make all too clear: ***the new rule is a terrible idea.***

Indeed, the Advisory Committee's request for comments on this rule has triggered a rather one-sided debate. The members of the Advisory Committee on Appellate Rules presumably had their reasons for approving the rule (although, frankly, the author of the advisory note has not explained those reasons particularly well). However, I cannot imagine that the members would have taken this step had they foreseen the torrent of opposition that would ensue. With due respect to the judges on the advisory committee, the opponents of the proposed rule include most of the leading lights of the Courts of Appeals, the Chief Justice of the Supreme Court of California, and no less than five of the federal circuits. When judges like Posner, Kozinski, Calabresi, Walker, Newman, O'Scannlain, Mayer, and Reinhardt—to name just a few—all step onto one side of the scale, it seems impossible to believe that the other side could have the weightier arguments.

The public comments of these respected judges reflect the consensus among appellate practitioners as well. According to Professor Patrick Schiltz, the reporter for the Advisory Committee, "almost all of the comments" that the Committee has received have been in opposition to the proposed rule. *See* http://appellateblog.blogspot.com/2004_01_01_appellateblog_archive.html (posted on Jan. 29, 2004). Furthermore, Professor Schiltz noted that the "vast majority of the comments" have come from attorneys in the Ninth Circuit. *Id.* That seems hardly surprising. The Ninth Circuit has the greatest number of judges and one of the most, if not the most, crowded dockets. The many practitioners in that Circuit understand that they will have the most to lose should the proposed rule be approved.

Professor Schiltz apparently dismisses "many" of these comments on the ground that they "seem to assume that the proposed rule would require circuits to treat unpublished opinions as binding precedent." *Id.* I am not sure what Professor Schiltz means by "seem to assume." I have not had the opportunity to read all the public comments, as has Professor Schiltz, but I question whether it is the professor, or the authors of many of those letters, who are engaging in an erroneous assumption. The advisory committee states quite clearly that the rule "does not require a court of appeals to treat its 'unpublished' opinions as binding precedent." Report of Advisory Committee on Appellate Rules at 33. Is it likely that "many" of the lawyers and judges who have written in opposition to the rule actually failed to heed this clear statement?

Rather, it seems to me that the opponents of the rule have quite clearly understood what the Advisory Committee apparently does not: From the viewpoint of practitioners, there is precious little difference between a rule ***permitting*** the citation of unpublished dispositions and one requiring the Courts of Appeals to treat them as binding precedents. It may be true that the Courts of Appeals will not be bound by unpublished dispositions cited in briefs. However, if unpublished dispositions could be cited, practitioners would have no choice but to treat them as highly relevant precedent. As a matter of prudence, and probably professional ethics, practitioners could not ignore relevant opinions decided by the very circuit court before which they are now litigating. Moreover, even if the Courts of Appeals were free to disregard those opinions, the district courts would likely consider themselves bound by what three judges of the Court of Appeals appear to have done. As the opponents of the rule have clearly understood, proposed Rule 32.1 would have the inevitable effect of giving unpublished dispositions precedential effect.

The Advisory Committee relies a great deal upon the proposition that the new rule is "extremely limited" because there is a sharp line between the citability and the precedential effect of unpublished dispositions. *Id.* at 30. Once it becomes clear that this blurry line cannot be drawn in practice, even the Advisory Committee acknowledges that the arguments against the rule have "great force." *Id.* at 33.

I thank the Committee for providing me, and other practitioners, with the opportunity to share our views on the proposed rule. As both Congress and the U.S. Supreme Court have recognized, the notice-and-comment process is a necessary procedure for intelligent agency decision-making. Reasons that seem solid when devised in an ivory tower, or a musty committee room, may often melt in the fresh air of public comment. As Professor Schiltz concedes, the public comments on the proposed rule have made it abundantly clear that the consensus within both the judiciary and the private bar is that proposed Rule 32.1 is fatally flawed. It therefore should not be approved.

I truly hope, and fully expect, that the Committee will respect the force and weight of this consensus and reject this ill-conceived rule.

Sincerely,

Steven A. Engel