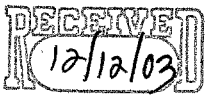

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03-AP-036

December 12, 2003

VIA TELECOPIER (202) 502-1755

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: Comments to Proposed FRAP 32.1

Dear Mr. McCabe:

I write in opposition to Federal Rule of Appellate Procedure 32.1, which would permit citation of unpublished opinions of the United States Courts of Appeal.[1] I am a partner in the Los Angeles office of McDermott, Will & Emery. For over 25 years, I have practiced civil litigation and intellectual property law before United States District Courts and the United States Courts of Appeal. From 1976-77, I served as law clerk to the Honorable Anthony M. Kennedy, then United States Circuit Judge, U.S. Court of Appeals for the Ninth Circuit.

I agree completely with those appellate judges and practitioners who have described how proposed Rule 32.1 would adversely affect the quality of judicial opinions at the Court of Appeals level. I wish to emphasize how proposed Rule 32.1 would also have a negative impact on practice before the trial courts. Over the last decade, as a result of computer databases, a vast amount of district court opinions and orders have become available to legal researchers. Often, these district court decisions were never meant to be published in the Federal Supplement and are only available on Lexis or Westlaw. The legal reasoning in these district court decisions is often oversimplified, inconsistent with existing precedent, or simply incorrect in light of higher court precedent. Nevertheless, practitioners often feel constrained to cite these decisions as persuasive authority, though the court issuing the opinion might have never intended publication.

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[1] Please note that, although for convenience I have written this on firm letter head, the views expressed in this letter are *solely* my individual views and do not necessarily reflect the views of my law firm.

To permit citation of unpublished opinions in Circuits with a heavy workload would severely compound this problem. Like many district court decisions, unpublished memorandum decisions at the Court of Appeals level often do not contain a full and detailed exposition of the salient facts and law governing the particular case. Yet, practitioners at the trial court level would invariably cite any unpublished memorandum that might be pertinent to a particular lawsuit. Moreover, even though proposed Rule 32.1 would provide that unpublished memoranda are not precedential, in my experience, a district court would rarely ignore an unpublished ruling of the Court of Appeals. Consequently, cases at the district court level could be decided based thinly reasoned or incorrectly reasoned unpublished Court of Appeals memoranda, creating error and a burden on the courts both at the district court and the appellate level.

I strongly urge that proposed Rule 32.1 not be adopted.

Sincerely,

Robert H. Rotstein

Robert H. Rotstein

RHR/sw

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