03-AP-058

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Marc D. Bond
Assistant Counsel
Law Department
Tel 907.263.7813
Fax 907.263.7607
Cell 907.229.5750
e-mail mbond@unocal.com

VIA FIRST CLASS MAIL

December 11, 2003

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 oppose the adoption of proposed FRAP 32.1.[1] The proposed rule would not result in better advocacy or better law. The rule would increase the costs of litigation, confuse the law of the various circuits, result in many more summary (i.e., opinion-less) dispositions, and delay the resolution of disputes. If a uniform federal rule is desirable—and I am not persuaded such is the case—the rule should prohibit the citation of unpublished decisions rather than permit it.

Effect on Advocacy: The adoption of the proposed rule would make it ethically mandatory for any attorney to substantially increase the scope and breadth of research. Each side in litigation will then cite to opinions which were never intended by the issuing body to be a disciplined statement of the facts or law applied to those facts. Our system would require that attorney advocates stir up such propositions out of these murky decisions as they could. No one would know whether such propositions were truly the law of the jurisdiction which authored the unpublished opinions.

Access to unpublished opinions would create a climate in which attorneys would be unable to advise clients regarding the state of the law. Non-litigators advising clients on prospective matters would also be required to expand their legal research to determine whether the courts of

[1] I write as an individual attorney with 25 years' experience before Alaska state courts, the US District Court for the District of Alaska, the Ninth Circuit Court of Appeals, and the US Supreme Court. In my current position, I advise my client on a wide range of legal matters including employment, service contracts, insurance, torts, oil and gas leasing, unitization and operations, pipelines and environmental issues. The views expressed in this letter are my own, and not necessarily those of Union Oil Company of California.

controlling jurisdictions—and perhaps others—have issued unpublished opinions which might be considered "persuasive" in future litigation.

The cost of litigating a case in the federal courts is already substantial. As noted above, every attorney will be ethically compelled to increase the scope of research both to determine whether unpublished opinions exist which are supportive, or to defend against unpublished opinions cited by the opposition. These costs will be borne by the client for no demonstrable benefit.

The commentary to the proposed role notes that advocates cite all manner of written materials in the hope of persuading appellate judges. The important distinction, however, is that none of the other materials purport to dispose of an actual case applying the law of the particular circuit. Unpublished opinions do just that, but in summary fashion. Requiring each circuit to allow citations to these dispositions carries the implication that such opinions are different from "Shakespearian sonnets, advertising jingles" and "virtually every [other] written or spoken word." In the unwritten hierarchy of citation preferences amongst appellate counsel, an unpublished opinion of the court before which an attorney is appearing will always be higher than any other available material.

In sum, there would be a lot more work for lawyers, accompanied by less clarity and higher bills for clients.

Effect on Law: Predictability of the law is paramount in any civilized society. Predictability creates appropriate incentives to act in certain ways in order to conform to the law. Investments can be made and projects undertaken with assurance regarding the application of law. Ideally, each person subject to the jurisdiction of the United States would know the legal effect of any act or omission prior to its occurrence. Admittedly, we do not achieve that ideal. With the ever-growing avalanche of statutes, regulations and published opinions, predictability is difficult at best.

If proposed FRAP 32.1 is adopted, predictability of the law will be dealt a serious blow. Unpublished opinions are not crafted so as to be informative beyond the parties. As the commentary to the proposed rule states: "The process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision." Yet permission to cite unpublished opinions clearly implies that one can glean well-stated and well-grounded legal principles from them. No one will know whether a particular proposition gleaned from an unpublished opinion is an accurate statement of the law, or whether such a proposition should be deemed "persuasive" by a court.

The adoption of proposed FRAP 32.1 would be akin to elevating a "Sense of the Senate" resolution to statute law. "Sense of the Senate" resolutions are precatory statements adopted by

senators without fear that they will be actually enforced. Each senator is free to vote on it as he or she sees fit, and can then explain it in a positive way to constituents on each side of the issue. To one side, the senator says, "Look what I voted for." To the opposition, the senator says, "Don't worry. It was just a throw-away vote anyway." In a similar way, judges often elect to use softer, less precise language, even throwing a bone or two to the losing side, in cases decided by unpublished memoranda. The judge understands that since the decision has no precedential value, he or she does not need to be painstaking in authoring the summary disposition.

Were FRAP 32.1 to be adopted, a judge would have one of three principled choices in resolving cases: (1) treat every opinion as a statement of the law of the jurisdiction, in which case the resolution of cases will take much, much longer as appellate courts are overwhelmed with the task of writing publishable opinions; (2) issue a simple "affirmed" or "reversed" either as to the entire matter or a list of issues, in which case the parties have little or no idea of the reason for the action; or (3) issue opinions in summary dispositions with an introduction or footnote (resembling the *Detroit Lumber* footnote at the bottom of the clerk's summary of a U.S. Supreme Court opinion) restating that the opinion was not drafted with citation in mind, and therefore any citation to it for any legal principle stated therein is specious.

Similarly, when faced with a citation to an unpublished opinion, a judge has one of two principled choices: (1) ignore the citation, which is by far the better option; or (2) carefully review the cited case in a generally futile effort to determine whether the facts are adequately stated and the law accurately discussed so as to permit legitimate allocation of some persuasive utility to the opinion.

In sum, proposed FRAP 32.1 will substantially increase the burden of both lawyers and judges without any evidence that it will produce better advocacy or better decisions.

Uniformity: At the very least, no case has been made that the matter requires national uniformity. There are very good reasons why uniformity (except, perhaps, to prohibit such citation) is undesirable. For instance, some circuits have fewer judges, fewer cases, and fewer decisions. The judges in such a circuit may decide they are able to profitably utilize citations to their circuit's unpublished opinions. Other circuits have two dozen judges and decide several thousand cases each year, some with published opinions but most without. In such circuits, the judges could well decide that allowing citation to unpublished opinions would create additional unnecessary and unhelpful work in drafting unpublished opinions and dealing with citations to the same.

At the same time, the advocates of the rule offer little in justification of a national standard. The commentary to proposed FRAP 32.1 asserts that the burden on attorneys to determine whether a particular circuit allows citation to its own unpublished opinions is significant. "These conflict-

ing rules have created a hardship for practitioners, especially those who practice in more than one circuit." "Attorneys will no longer have to pick through the conflicting no citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an 'unpublished' opinion." I have always found it good practice—if not required by ethics—to become very familiar with the rules of any tribunal before I appear in that tribunal. This will not change regardless of the disposition of proposed FRAP 32.1. Lawyers will still have to know the rules of each circuit in which they file motions, briefs and other documents.

The commentary asserts that it is difficult to justify a system which allows unpublished opinions of all jurisdictions except its own to be cited to a circuit court, yet offers no "justification" for this statement. While a circuit court may or may not have authority to prohibit citation of unpublished opinions from other jurisdictions, each circuit can certainly decide to prevent mischief by forbidding citations to its own unpublished opinions. I also suspect that the persuasive value of the citation of an unpublished opinion from any jurisdiction in a brief filed with a circuit which prohibits citation to its own unpublished decisions is next to zero.

At the least, each circuit should be permitted to make its own determination on citation to its unpublished opinions. If, however, uniformity is desirable, then the above discussion leads one to the ineluctable conclusion that citation to unpublished opinions of any kind should be prohibited. There is enough discussion of the law in the scholarly body of published opinions and collateral sources. There is no need to wet a line in the murky waters of unpublished dispositions fishing for the bottom feeders that might be found there.

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I urge the Judicial Conference Advisory Committee on the Appellate Rules to reject proposed FRAP 32.1

Best regards,

Marc Bond

Marc Bond
Assistant Counsel