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03-AP-099

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: Opposition to FRAP 32.1

Dear Mr. McCabe:

I write in opposition to the proposed change in FRAP 32.1. As the Advisory Commentary states, the Rule would have significant impact on current policies in most Circuits:

> Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may not place any restriction upon the citation of "unpublished" opinions, unless that restriction is generally imposed upon the citation of all judicial opinions — "published" and "unpublished." Courts are thus prevented from undermining Rule 32.1(a) by imposing restrictions only upon the citation of "unpublished" opinions (such as a rule permitting citation of "unpublished" opinions only when no "published" opinion addresses the same issue or a rule requiring attorneys to provide 30-days notice of their intent to cite an "unpublished" opinion).

I oppose the change. For six years, I was a member of the Ninth Circuit Advisory Rules Committee (1997-2002). This issue came before us almost every year. In 1978, was a member of California Chief Justice Bird's Committee on Publication Rule, and studied the pros and cons of publication of all opinions in California. My 30 years of appellate experience studying these rules informs me that the courts and practitioners would gain little from a rule that permits citation

of what are now deemed "unpublished" opinions. However, the costs would be significant and do not warrant the change. In the vernacular, "if it ain't broke don't fix it."

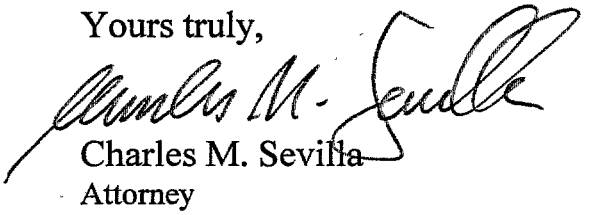
The proposal would surely create significant burdens to practitioners, particularly those not in institutions like the U.S. Attorney's office and Federal Public Defenders. This is most obvious considering that legal research would now be expanded to include an 80 percent volume increase of data to be scoured. (Published opinions make up approximately 15-20% of the issued opinions in the Ninth Circuit). Further, my experience is that unpublished opinions are less developed both factually and legally, thus setting up inevitable briefing battles over the meaning of the unpublished, but cited, case.

These problems are surely not mitigated by the proposal's statement that unpublished dispositions need not be deemed controlling authority. If cited by an opponent, they must be dealt with in reply, and if available for citation, one must still do the research to determine if useful decisions are available for presentation in an opening brief.

Another predicable consequences from passage of such a rule may be that in routine cases, judges would resort to summary one-line decisions like "Affirmed" to avoid having to spend the time to write an unpublished decision that the judges know would be available for citation as persuasive authority. This consequence would be a bad one, but it may well occur as a mechanism of judicial self-defense. Judges are already overloaded with cases. They have little enough time to address the significant opinions now issued as citable authority. To expand the rule to make everything citable will have the predictable consequence of judges either taking more time to address all the routine cases (I doubt any of the judges on the Ninth Circuit believe there is "more time"), or issuing one line decisions.

There is no need for uniformity in the Circuits on this issue. For years, we have had various publication rules in the Circuits without problem. Let the Circuits continue to deal with this rule.

Yours truly,



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