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03-AP-103

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January 12, 2004

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

Re: ***Proposed Rule 32.1***

Dear Mr. McCabe:

This letter is written in opposition to proposed Rule 32.1, which would permit the citation of unpublished Court of Appeals decisions. I address the issue from the point of view of litigants and prospective litigants, whom I have represented in the Ninth Circuit and in the California State appellate courts for more than 40 years.

The principal problem facing appellate litigants and prospective litigants is not the lack of adequate precedent setting authority. There is plenty. Instead, the principal obstacles, other than the risk of losing, are cost and delay. Many worthy appeals are not pursued and many worthless appeals create unfair leverage for settlement based on considerations of costs and delay. Accordingly, any change in procedure which is likely to increase the cost of appellate review or extend the time required for appellate review are undesirable.

If all appeals, published and non-published, become citable, the cost of appeals to litigants will increase significantly. For litigants in the Ninth Circuit, the research base available to attorneys will increase from around 700 to 4,500 cases per year. Conscientious attorneys, including those worried about potential malpractice claims, will feel pressured to examine the vast body of unpublished opinions in search of an occasional grain of relevance. Of necessity, this increased burden of research is likely to add significantly to the client's cost of pursuing or resisting an appeal.

Can the additional cost be justified? I think not. Remember, the appellate panel issuing a non-published opinion makes two decisions: first, the case presents neither facts nor issues warranting a disposition having precedential value. Second, the opinion will be written in a manner not designed to produce precedential value. Given these factors, the increased costs to clients of having their attorneys research non-published opinions cannot withstand a cost-benefit analysis. The cost is there. The benefit is not.

Proposed Rule 32.1 would be harmful to litigants in a second respect, delay. While litigation is pending, litigants must frequently hold important decisions in abeyance. Business decisions, careers, and other important life decisions must frequently be placed on hold. The longer the delay, the greater the hardship. A civil appeal in the Ninth Circuit usually takes more than a year, and in complex cases can exceed two years . Implementation of Rule 32.1 will prolong the appellate process. First, attorney's research time will be significantly extended by the huge increase in the research base. Next, and of greater importance, appellate judges and their staffs will be pressured to write non-published opinions differently. Instead of writing short, quick opinions to the parties only, advising them who won and why, the justices will now have to take additional care and time to write decisions that will not be confusing or misleading to outsiders. This slower process, applied to over 80% of the courts cases, surely will significantly extend the time the court requires to decide its cases. This will prolong the hardship litigants will face waiting for their cases to be decided. Delay alone may cause some litigants to settle their claims for less than true value, others to pay substantial sums to settle worthless claims.

In sum, so far as the litigants are concerned, the extent to which the real hardships of cost and delay are likely to be increased by application of Rule 32.1 far outweighs any benefits which might accrue to them, if indeed there are any benefits at all.

Turning now to the precedential effect of published opinions, will the public interest be served by allowing all opinions to be citable? Is more necessarily better? I think not. Published court of appeal opinions on important issues have a profound effect on broad segments of our society. Public entities, businesses, universities and many others look to the courts for guidance and direction in the conduct of their affairs. They look to the court for clarity, continuity, predictability and reasoned fairness. As many of our appellate judges have advised us, writing opinions to meet these requirements is a difficult and time consuming assignment. Our appellate judges cannot produce 150 decisions per year and review an additional 300 by their co-panelists that meet these standards. Instead, they aim for these standards and publish their opinions only in a relatively small percentage of cases

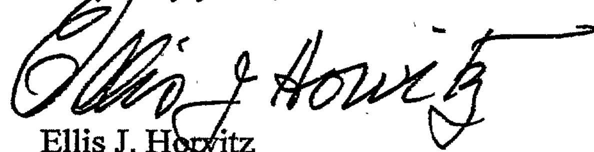
(less than 20%) which, in their opinion, are of significant precedential value. The great majority of cases do not meet this standard and are disposed of by summary opinions. These cases are selected and written in a manner that virtually guarantees they will have no precedential value. Once the judges have done their best to separate the wheat from the chaff, what purpose is served by forcing the parties to examine the chaff?

It follows that the public interest would not be served by making thousands of non-published opinions citable. To the contrary, the public need for guidance and direction in the application of the law would be compromised. A flood of staff-written, hastily reviewed opinions would simply muddy the waters. The goals of judicial precedent will be better served by 700 carefully written opinions standing alone, rather than by adding 3,800 additional opinions each year lacking in precedential value and careful draftsmanship.

To sum up, I believe the Ninth Circuit and other appellate courts, state and federal, confronted with comparable workloads, have struck a sensible balance under the existing rules of federal procedure. Our judges should be free to devote their principal attention to the small percentage of cases that present issues of significant precedential value and to craft and publish opinions of the high quality the public is entitled to expect.

At the very least, the decision whether to allow the citation of non-published opinions should be left to each circuit. My own experience is primarily limited to the Ninth Circuit. If there are other circuits where the judges carry significantly lower case loads, those judges may decide to devote more time to non-published opinions, or indeed to publish all their opinions, and to assume the added burden that decision imposes. But for courts laboring under the per-judge case load the Ninth Circuit does, the decision to forbid citation of non-published opinions is a wise one.

Very truly yours,



Ellis J. Horvitz

EJH/jgp

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RECEIVED 2/26/04 envelope postmarked 2/5/04

03-AP-103 Addendum

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February 5, 2004

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

Re: ***Proposed Change to Rule 32.1***

Dear Mr. McCabe:

I recently sent you a letter opposing the proposed adoption of to Rule 32.1. I expressed the view that, from the point of view of litigants, the proposed change would be disadvantageous. It would add to the cost of appeals and delay final resolution of their rights. This would be harmful to all litigants and, in many cases, would defeat their right to obtain appellate review. For your convenience, I enclose a copy of my letter.

I disagree with the recent comments of Advisory Committee member Patrick Schiltz in response to widespread opposition to the proposed rule. He attempts to minimize the impact of the proposed rule by stating the change does not require circuits to treat unpublished opinions as binding precedent, it merely permits their citation "but leaves judges free to do whatever they wish with those citations." Professor Schiltz's answer misses the mark. I offer the following comments:

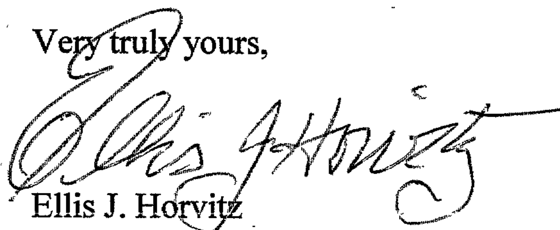
1. If it leaves judges free to do "whatever they wish" with citations to unpublished opinions, what will the judges do? What criteria will they apply in deciding whether or not to give unpublished opinions binding precedent? Professor Schiltz has highlighted the problem: the proposed new rule is an invitation to judicial chaos. In order to obtain uniformity and correct a nonexistent problem, the proposed change would destroy uniformity and create nationwide confusion on an issue of fundamental importance.

2. From the point of view of litigants and their attorneys, so long as the judges are "free to do whatever they wish" with non-published opinions, attorneys must review all non-published opinions and treat them as if they were binding precedent because, after all, who knows what the judges will do.

3. If there is language in a non-published opinion which may be persuasive, attorneys are free to use that language, but not refer to the unpublished opinion from which it comes. If the language is persuasive, it should stand on its own merits.

Professor Schiltz and the other members of the committee should keep in mind that the primary function of the appellate courts is (1) to adjudicate the interests of the litigants who appear before the court and (2) to provided thoughtfully reasoned and carefully drafted opinions to help guide our citizens in lawfully conducting their daily affairs. These fundamental services should not be trumped or compromised in order to provide grist for the academic mill.

Very truly yours,



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Enclosures

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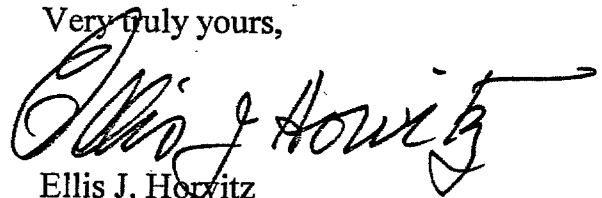

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