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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: ***Opposition to Proposed Rule 32.1***

Dear Mr. McCabe:

I have been practicing appellate law for 17 years, and I represent private litigants in dozens of civil appeals and writ proceedings each year. Research and legal writing is just about all I do as an attorney. Consequently, I have followed with interest the proposal to adopt Rule 32.1 and the discussions within the legal community about that proposal. I write to express my opposition to it.

Most of the experienced attorneys I know readily recognize that their clients' interests, and the interests of justice, will *not* be served if counsel drafting trial court and appellate court briefs must account for a vast body of opinions that the authoring judges never believed should serve as "persuasive" authority in any future litigation. Imposing that burden on litigants' counsel would obviously drive up attorney fees. Imposing the burden on judges and their staff to read all the extra cases cited by attorneys, and to account for such cases in their own research, would obviously drive down the courts' ability to handle cases efficiently and expeditiously.

So if the disadvantages are so plain, I've wondered what countervailing advantages are seen by proponents of rule 32.1. What defect in the current system would be addressed by the rule? I've concluded there is none, and that the proposed rule is a solution in search of a problem.

The most common argument I have heard in support of rule 32.1 rests on vague notions of "free speech" and conspiracy theories about muzzling critics of a "secret" body of law. But no free speech rights are infringed by the current

rules. In this age of internet posting and commercial legal research services, unpublished opinions can readily be tracked down. They can then be discussed openly in the legal community, in the press, in law schools, and elsewhere. Those with an interest in the outcome can address the unpublished opinions in amicus submissions challenging or supporting the opinions in the context of petitions for rehearing or certiorari. The opinions can be analyzed in law review articles or treatises, which analyses can in turn be cited in briefs. They can even be plumbed by litigants in other cases for useful concepts and citations, and their language can be borrowed for use in a brief if the brief 's author can't turn a better phrase than is found in an unpublished opinion.

So what is the "free speech" problem? There is only one bit of information that an attorney who files a brief is not supposed to insert about concepts or language culled from an unpublished opinion: *attribution*. The attorney can rely fully on the force of logic contained in an unpublished opinion, but cannot add to the persuasive force of that logic by attempting to use the fact that a judge in a different case has previously said the same thing. This rule makes good sense. By definition, the judge or judges who designated the opinion as "not for publication" did not *want* attribution, did not believe that the reasoning or outcome of the case *should* drive the reasoning or outcome in another case.

A rule of judicial administration that allows parties' briefs to cite only those opinions designed by the authors to be precedent infringes "free speech" no more than a rule requiring parties to stick to the trial court record rather than reciting facts outside the record for their "persuasive" value. It is no more a "free speech" violation than imposing certain restrictions on a party who asks a court to take judicial notice of certain materials. For sound public policy reasons, the current rules recognize that certain materials or information should not be taken into consideration by the judge deciding a case. By the same token, good public policy supports a rule that a party relying on a phrase or an idea appearing in an unpublished opinion must rest on the strength of the argument alone, and the fact that the judge in another case made the same argument should not be taken into consideration when that judge did not believe future cases should turn in any way on the judge's opinion.

In a perfect world of unlimited resources and infinite wisdom, it might be possible to parse the facts and reasoning of every opinion ever crafted and come up with legal principles that harmonize every result. Maybe under those circumstances judges would be pleased to designate all opinions for publication, and lawyers would be pleased to read and cite them all when advocating their clients' interests. But in the real world, it seems difficult enough for judges to craft a "seamless web" of precedent without asking them to

weave in every single stray bit and piece of litigation that comes through the courthouse door. And, from my own experience, I know it is difficult enough (and costly enough for my clients) to find and analyze the published opinions relevant to my clients' cases, without adding to my clients' tab the cost of checking out six or seven times as many additional opinions that weren't drafted to be precedential or persuasive in the first place.

In sum, proposed rule 32.1 would add to judges' and litigants' burdens without improving our judicial system.

Thank you for providing an opportunity to comment on proposed rule 32.1. I urge the Committee on Rules of Practice and Procedure to abandon the proposal.

Sincerely,

Lisa Perrochet

Lisa Perrochet

"Lisa Perrochet" <lperrochet@horvitzlevy.com>
02/05/2004 12:10 PM

To: <Rules_Comments@ao.uscourts.gov>
cc:
Subject: Re: Comment on Proposed Rule 32.1 and Professor Schiltz

I'm sorry to note that the link in the first paragraph of my note to you below is incomplete. It should have been: http://appellateblog.blogspot.com/2004_01_01_appellateblog_archive.html#107541685188140341.

I apologize for any inconvenience.

>>> Lisa Perrochet 2/3/2004 7:24:37 PM >>>
Dear Mr. McCabe -

I have previously written to you to express my concern about what I predict would be an adverse impact on my clients and on the administration of justice if rule 32.1 is enacted as proposed. (See attached letter.) I am following up those comments now by expressing my concern that the Advisory Committee on the Federal Rules of Appellate Procedure may unduly discount my comments and the many others submitted in opposition to rule 32.1. Specifically, I am worried about the attitude reflected in one Committee member's submission to Howard Bashman for posting on Mr. Bashman's internet web log ("blog"): http://appellateblog.blogspot.com/2004_01_01_appellateblog_archive.html.

On January 29, Mr. Bashman's 17:00 entry posts the following message from one of the Committee's members, Professor Patrick Schiltz, identified as Reporter for the Committee:

Here is a status report on the proposed amendments to the Federal Rules of Appellate Procedure. You are free to share this information with your readers if you think it would interest them.

1. We have received close to 170 comments, and we are receiving more every day. This is already an extraordinarily high number of comments for proposed rules of appellate procedure, and the comment period does not end until February 16.

2. Almost all of the comments have been about proposed Rule 32.1 (on unpublished opinions), and almost all of those comments have opposed the rule. We have received fewer than a dozen comments on proposed Rule 28.1 and on the proposed amendments to Rules 4, 26, 27, 28, 32, 34, 35, and 45.

3. Interestingly, the vast majority of the comments on proposed Rule 32.1 (I estimate 80 to 90 percent) have come from judges, attorneys, and others in the Ninth Circuit (or former clerks to judges in the Ninth Circuit).

4. Many of the comments about Rule 32.1 seem to assume that the proposed rule would require circuits to treat unpublished opinions as binding precedent. The proposed rule does not do so. It permits attorneys to cite unpublished opinions, but it leaves judges free to do whatever they wish with those citations. To quote the Committee Note: "Rule 32.1 is extremely limited.... It says nothing about what effect a court must give to one of its 'unpublished' opinions or to the 'unpublished' opinions of another court."

Please let me know if you have any questions. We appreciate your publicizing the proposed rules and inviting your readers to comment.

Professor Schiltz's posting is more than the "status report" it claims to be. The first and second points might be characterized as objective statements that offer information of interest to readers of Mr. Bashman's blog. The third point, however, is a not-so-subtle suggestion that the overwhelming opposition to rule 32.1 stems only from a narrow subset of Ninth Circuit judges and practitioners whose views should be discounted as unrepresentative.

I take personal offense at Professor Schiltz's suggestion. I have been closely following the arguments for and against various forms of citation rules since long before rule 32.1 was proposed. (See the introduction to my comment letter, attached, and see the Los Angeles County Bar website at http://www.lacba.org/showpage.cfm?pageid=3037, setting forth materials, including letters authored by me, in response to California citation rule proposals, at .) I have never been a Ninth Circuit clerk, and I know that concerns about rule 32.1 are by no means limited to those who practice or preside in the Ninth Circuit. Indeed, the Chief Justice of the Federal Circuit has recently noted the unanimous opposition to the rule in his Circuit. (See http://www.fedcir.gov/pdf/fedcir.pdf.)

Moreover, as an active member of the Los Angeles County Bar Appellate Courts committee, I can report that only ONE of our members expressed support for rule 32.1 during our various listserv exchanges and during a January 2004 committee meeting devoted to the topic. Consequently, our committee, comprised of a diverse group of some 140 private and government practitioners with civil and criminal appellate practices, as well as state appellate court staff, has submitted a letter strongly opposing the rule. That letter, reflecting the views of so many experienced appellate lawyers, is in no way connected with or a product of the Ninth Circuit, and should be given the heavy weight it deserves, notwithstanding Professor Schiltz's insinuations.

It may be that an obvious reason why so many letters have come from Ninth Circuit and California lawyers is that there are simply more lawyers and judges in these jurisdictions. I understand that California's state court system is larger (employing more judges, processing more cases, and producing more appellate opinions) than the entire federal court system combined. In addition, as a group, the lawyers practicing in the Ninth Circuit and California state courts are probably more keenly aware of the crushing pressure placed on a judiciary responsible for handling the case load coming through our courts, and the disastrous effects that rule 32.1 would have on the judges' ability to handle that load. That does not mean, however, that our sensitivity to the issue is unique, or that it is not shared by our colleagues in other jurisdictions, as Professor Schiltz's comment implies.

Professor Schiltz's fourth point is, as far as I can tell, a flat misrepresentation, and again appears to reflect a bias and a far-from-neutral design to encourage readers of Mr. Bashman's blog to send comments in support of rule 32.1. Professor Schiltz tries to discredit opposition comments by saying many "assume that the proposed rule would require circuits to treat unpublished opinions as binding precedent." My own comment and the other comments I have seen (about two dozen of the 170 reportedly submitted so far) assume no such thing. Indeed, a comment submitted to you by one of my partners (chair of the California State Bar appellate courts committee, which is NOT affiliated with the Los Angeles County Bar committee) specifically notes that the ability of courts to give only persausive rather than precedential value

to unpublished opinions does little or nothing to avoid the likely perils of a rule requiring the Circuits to allow citation of all opinions. (See second attachment.)

I would not be troubled if the arguments posted on Mr. Bashman's blog were submitted by an interested outsider, but they were not. Purporting to speak on behalf of the Advisory Committee, Professor Schiltz says that "we" (the Committee) appreciate Mr. Bashman's "publicizing the proposed rules and inviting your readers to comment." As presented on the blog (which introduces Professor Schiltz's comments with the exhortation, "it's time to hear from the heretofore silent majority"), the Professor's submission is, to me, an unseemly solicitation for one side's views. Based on my conversations with innumerable lawyers on the issue, and my perusal of a great many written arguments concerning California rule proposals as well as proposed rule 32.1, I am convinced there is no "silent majority" that is just too passive to speak up in support of such rules, as suggested on Mr. Bashman's blog. The opposition letters and e-mails received by the Advisory Committee to date appear to proportionally represent the views of those who have explored this issue, and I am disappointed that at least one Advisory Committee member seems bent on skewing the survey results.

- Lisa Perrochet
HORVITZ & LEVY
818/995-0800


FRAP-signed.pdf


FRAP 32-1.pdf

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Sincerely,

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January 27, 2004

Mr. 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 F.R.A.P. 32.1**

Dear Mr. McCabe:

I am an appellate practitioner at California's largest civil appellate law firm. I have been a partner of the firm since 1997, and am a certified appellate specialist. I am also current chair of the California State Bar Appellate Courts Committee and a member of the Los Angeles County Bar Appellate Courts Committee, both of which are submitting comments in opposition to proposed Federal Rule of Appellate Procedure 32.1. I write separately to emphasize a couple points.

First, the proposed rule imposes significant new research burdens on attorneys (and their clients in the form of attorney fees) without any benefit of corresponding magnitude. The Advisory Committee Note ignores this burden, arguing that if implemented, the new rule will instead "relieve attorneys of several hardships," including the supposed hardship of having "to pick through the conflicting no-citation rules of the circuits in which they practice." Proposed Fed. R. App. 32.1 advisory committee note, at 35 [hereafter Advisory Committee Note]. But the Advisory Committee Note repeatedly emphasizes that the various circuit courts remain free to decide whether unpublished decisions should be given any precedential value. Advisory Committee Note, *supra*, 30, 33. So instead of having to pick through "conflicting no-citation rules" when citing unpublished cases from different circuits, attorneys will now have to pick through "conflicting precedent rules" governing the citation of such decisions. For example, some circuits may enact local rules providing that unpublished decisions have no precedential value in that circuit, regardless of source. Others may refuse to

give precedential value only to their own unpublished decisions. Still others may allow their own unpublished decisions to be given precedential value, but not give precedential value to unpublished decisions from other circuits which have contrary rules. The permutations and potential conflicts are numerous. Thus, far from removing an imagined conflict hardship, the proposed rule creates a new, more significant one.

Second, I am also gravely concerned that if the new rule is enacted, unpublished decisions will no longer provide any discussion regarding how and why the court reached its decision, but instead federal appellate courts will merely state "Affirmed" or "Reversed" in their unpublished decisions. Many circuit court judges have warned they will be forced to take this approach rather than devote the enormous amount of time necessary to ensure that their unpublished opinions include no language that could be misconstrued or misapplied in future cases. Any increase in the number of "memdispos" that resolve appeals without addressing the arguments of the parties and explaining how the court reached its result will be extremely demoralizing to both the appellate bar and their clients. In my own practice, I have found that nothing is more discouraging than having devoted months of effort to reviewing a trial record, researching the issues, and crafting an appellate brief, only to receive a one or two paragraph decision that does not consider and address all the legal arguments that have been made. When I was a judicial clerk working for the Fifth Circuit Court of Appeals, we made a concerted effort to ensure that even our unpublished decisions addressed all of the arguments asserted by the parties, and explained how the court had reached its result. I strongly oppose a new rule that would provide a coercive new incentive for circuit courts to issue even more cursory decisions than are already being written.

Very truly yours,

John A. Taylor, Jr.

JAT:mmg

How Appealing

Saturday, January 31, 2004

The Detroit Free Press is reporting: Today's newspaper contains articles headlined **"Questions cloud terror case; High-profile prosecution receives new scrutiny"** and **"Judge gives dates trial may resume; Kerkorian, DCX could be back in court within weeks."**
posted at **21:10** by **Howard Bashman**

"Asylum backed on China's birth-control policy; U.S. appeals court rules for woman who fled after threats": Bob Egelko of **The San Francisco Chronicle** today has **this article** on **a ruling** that an eleven-judge en banc panel of the **U.S. Court of Appeals for the Ninth Circuit** issued on Thursday. The vote on the outcome was 10-1. Circuit Judge **Andrew J. Kleinfeld** begins his dissenting opinion by asking "If the Supreme Court speaks, and lower courts do not hear it, does it make law?"

Another article by Egelko in today's Chronicle bears the headline **"U.S. must pay immigrant for illegal removal."**
posted at **20:57** by **Howard Bashman**

In Saturday's newspapers: In **The New York Times**, Adam Liptak and Michael Moss have an article headlined **"In Trial Work, Edwards Left a Trademark."** In news from Delaware, **"Judge Says DaimlerChrysler Trial Will Resume."** An article reports that **"German Court Convicts Internet Cannibal of Manslaughter."** In business news, **"G.M. Nears Settlement in Lawsuit Over Lending."** And in local news, **"Judge Defends His Record at Hearing on Charges."**

The Washington Post reports that **"Military To Watch Prisoner Interview; Hamdi's Lawyer Resents Monitoring."** In local news, **"Lentz Prosecutor Volunteers For Probe on Banned Evidence."** An article reports that **"White House Holding Notes Taken by 9/11 Commission; Panel May Subpoena Its Summaries of Bush Briefings."** In other news, **"FBI Investigates Head of Detroit Office; Agent Reassigned as Agency Looks Into Handling of Confidential Informants."** In business news, **"GMAC Agrees to Settle Racial-Bias Lawsuit; Lender Accused of Charging Blacks More."** And editorials are entitled **"Time for Tribunals"** and **"The Marriage Experiment."**

The Web's first blog devoted to appellate litigation

By Howard J. Bashman

Email address: appellateblog -at- hotmail.com

posted at **14:52** by **Howard Bashman**

Today's Ten Commandments news: From Tennessee, **The Knoxville News-Sentinel** reports that **"Monroe to fight suit over commandments; Mayor denies posting of tracts violates constitutional rights."** In other coverage, **The Monroe County Advocate** reports that **"ACLU files suit against county."**

From Georgia, **The Athens Banner-Herald** reports that **"Barrow finds ally to help fight suit; Battle with ACLU."**

And from Alabama, **The Birmingham News** reports that **"Pryor opposes Moore's appeal."**
posted at **14:33** by **Howard Bashman**

Today's Ninth Circuit opinions: Today the **U.S. Court of Appeals for the Ninth Circuit** issued two precedential opinions.

One case involves a whole bunch of money, arising from the federal government's challenge to the tax treatment of a lump sum that the winner of a $9 million prize in the Oregon lottery received in exchange for assigning to a third-party the right to be paid that award in 20 annual installments. You can access the tax ruling **at this link.**

The even more interesting decision, at least to me, involves no money at all in the view of the three-judge panel's majority. And that's the problem, because in the absence of any amount in controversy this diversity of citizenship case does not belong in federal court. Circuit Judge **Alex Kozinski** has written a vociferous and most persuasive dissent, with which I agree. Indeed, I would not be surprised to see this case overturned on rehearing en banc or by the **U.S. Supreme Court** if the appellant is willing to pursue the matter. The majority holds that where a plaintiff in an arbitration case is awarded no recovery, his action to overturn the arbitration award involves an amount in controversy of $0. Judge Kozinski persuasively (and with his usual flair) explains why the amount in controversy must be viewed as the amount that the plaintiff sought to recover in the arbitration. This opinion can be **accessed here.**
posted at **13:30** by **Howard Bashman**

Thanks so very much! Thanks to everyone who has taken the time to send along congratulatory words and good wishes in response to **my mention here** this morning that I will on Monday, February 2, 2004 be opening my own law firm focusing on appellate litigation. Your kind words and thoughts are most appreciated.
posted at **13:00** by **Howard Bashman**

You're not free to go: The Associated Press is reporting that **"Cell Doors Spring Open on Ark. Death Row,"** while **Reuters** reports